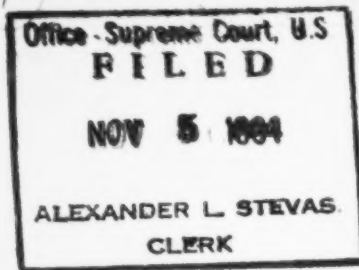


84-718



Number A-194

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1984

Robert L. Mendenhall, Petitioner,

vs.

**The United States of America, The United States
Department of the Interior, and Cecil D. Andrus,
Secretary of the Interior and Edward F. Spang,
State Director of the Nevada Office of the
Bureau of Land Management, Respondent.**

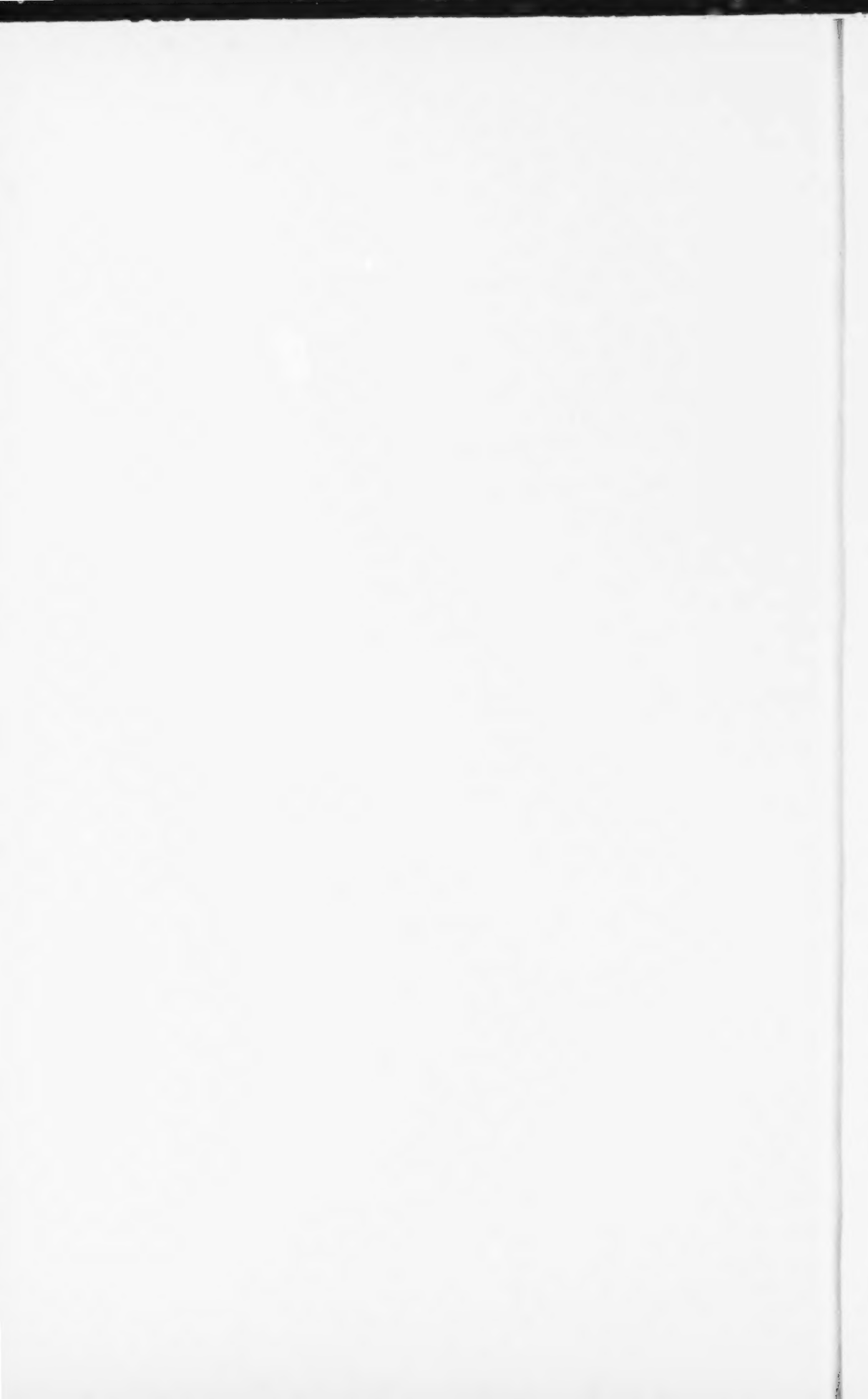
On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

Hale C. Tognoni
Suite 1260
100 West Clarendon Avenue
Phoenix, Arizona 85013

Counsel for Petitioner

11/10/84



Questions Presented for Review

1. Has Respondent, in administering the mining law, applied a standard of "discovery" wholly outside judicial interpretation and in opposition to the intent of Congress and the purpose of the mining laws?

2. Does due process require that agency discretion be judicially reviewed as to the facts in a condemnation without compensation and with no higher purpose contemplated for the condemned property?



Table of Contents

| | |
|--|----|
| Questions presented for review..... | 1 |
| Table of Authorities..... | 3 |
| Statutes..... | 6 |
| Other..... | 6 |
| Citations for opinions delivered in the Courts and the Interior Dept..... | 8 |
| Jurisdiction..... | 9 |
| Constitutional Provisions and Statututes Involved..... | 11 |
| Statement of the Case..... | 15 |
| First Reason for Allowance of the Writ... | 21 |
| Second Reason for Allowance of the Writ.. | 38 |



TABLE OF AUTHORITIES

| <u>CASES</u> | <u>PAGE</u> |
|---|----------------|
| <u>Arkla Exploration Co. and the State of Arkansas v. Arkansas - Texas Oil and Gas Corporation and James G. Watt.....</u> | 35 |
| 734 F.2d 347 (1984) | |
| <u>Best v. Humboldt*.....</u> | 38-9, 41-2, 44 |
| 371 U.S. 334, 335 (1963) | |
| <u>Book v. Justice Mining Co.....</u> | 26 |
| 58 F. 106, 124-25 (C.C.D. Nev. 1893) | |
| <u>Bowen v. Sil Flo.....</u> | 23 |
| 1969, 451 P.2d 626, 9 Ariz. App. 268 | |
| <u>U.S. v. Boyle.....</u> | 33 |
| 519 F.2d 551 (9th Cir. 1975) | |
| <u>Castle v. Womble.....</u> | 27 |
| 19 Pub. Lands Dec. 455 (1894) | |
| <u>Charlestone Stone v. U.S.....</u> | 17, 32 |
| Dist. Ct. Nev., Civ.No. LV 2039 BRT, decided Nov. 7, 1974; Ninth Cir. Ct. No. 75-1532, decided May 12, 1977; order clarifying remand, Jan. 3, 1979. | |
| <u>U.S. v. Coleman.....</u> | 24, 31 |
| Cal. 1968, 88 S.Ct. 1327, 390 U.S. 599, rehearing den. 88 S.Ct. 1834, 391 U.S. 961, cert. den. 89 S.Ct. 1047, 394 U.S. 907 | |

* Recent U.S. Supreme Court cases in Boldface Print



| | |
|---|-------|
| <u>Creede & Cripple Creek v. Uinta</u> | 23 |
| Colo.1905, 25 S.Ct.266, 196 U.S. 337 | |
| <u>Chrisman v. Miller</u> | 27,29 |
| 197 U.S. 313 (1905) | |
| <u>U.S. v. Deasy</u> | 45 |
| 24 F. 108 (D. Idaho 1928) | |
| <u>Edwards v. Kleppe</u> | 30 |
| 588 F.2d 671, 673 (9th Cir. 1978) | |
| <u>Foster v. Seaton</u> | 30,31 |
| Dist. Ct. of App., D.C., No. 14953, decided Oct. 22, 1959 | |
| <u>U.S. v. Guzman</u> | 25 |
| Arizona Contest Nos. A-035688 and A-035690 (1973) | |
| <u>Heydenfeldt v. Daney</u> | 23 |
| Nev. 1877, 93 U.S. 634 | |
| <u>Holy Trinity v. U.S.</u> | 37 |
| 143 U.S. 457, 459 (1892) | |
| <u>U.S. ex rel. U.S. Borax Co. v. Ickes</u> | 23 |
| 1938, 98 F.2d 271, 68 App. D.C. 399, cert. den. 59 S.Ct. 80, 305, U.S. 619. | |
| <u>U.S. v. Johnson</u> | 33 |
| IBLA 78-507 (Feb. 28, 1979) | |
| <u>Madison D. Locke v. Watt</u> | 42 |
| U.S. Dist. Ct., Nev., Civil R-82-297 BRT, decided Oct. 21, 1983, S.Ct. cert. for Oct., 1984 | |
| <u>McKinley v. Wheeler</u> | 23 |
| Colo. 1888, 9 S.Ct. 638, 130 U.S. 630 | |



| | |
|---|------------|
| <u>Melluzzo v. Morton</u> | 30 |
| 534 F.2d 860, 862-863 (9th Cir. 1976) | |
| <u>Montana Ry. Co. v. Warren</u> | 40 |
| 137 U.S. 348, 352-53 (1890) | |
| <u>Morrissey v. Brewer</u> | 41, 42, 46 |
| 408 U.S. 471, 481-482 (1972) | |
| <u>U.S. v. Noguiera</u> | 49 |
| 403 F.2d 816, 823 (9th Cir. 1968) | |
| <u>U.S. v. Rizzinelli</u> | 23, 47 |
| D.C. Idaho 1910, 182 F. 675 | |
| <u>U.S. v. Snyder, et al</u> | 33 |
| U.S. Dist. Ct., Colo., Civil Action No. 66-C-131, decided April 18, 1967; 10th Cir. Ct. appeal, decided May 24, 1969. | |
| <u>Steel v. Smelting Co</u> | 23 |
| Colo. 1882, 1 S.Ct. 389, 106 U.S. 477 | |
| <u>Verrue v. U.S.</u> | 29 |
| 457 F.2d 1202 (1972) | |
| <u>Western Mining Council v. Watt</u> | 42 |
| 643 F.2d 618, 628 (1981) | |
| <u>Wilber v. U.S. ex rel. Krushnic</u> | 41 |
| 280 U.S. 306, 317 (1930) | |
| <u>Zeigler v. S.& N. Ala. R.R. Co</u> | 40 |
| 58 Ala. 594, 599 (1877) | |



STATUTES

Mineral Lands and Mining - Title 30

| | |
|------------------|-------------|
| Section 22..... | 18,22,27,45 |
| Section 35..... | 24 |
| Section 161..... | 43 |
| Section 611..... | 16,24 |
| Section 21..... | 45 |
| Section 26..... | 45 |

General Mining Regulations of the Bureau of Land Management - Title 43

| | |
|----------------------------|----|
| Section 185.1 - 185.3..... | 45 |
|----------------------------|----|

OTHER

Government Accounting Office Report,

| | |
|-------------------------------------|----|
| GAO/RCED-84-17, August 2, 1984..... | 35 |
|-------------------------------------|----|

Hansen, Clinton J., "Why Location

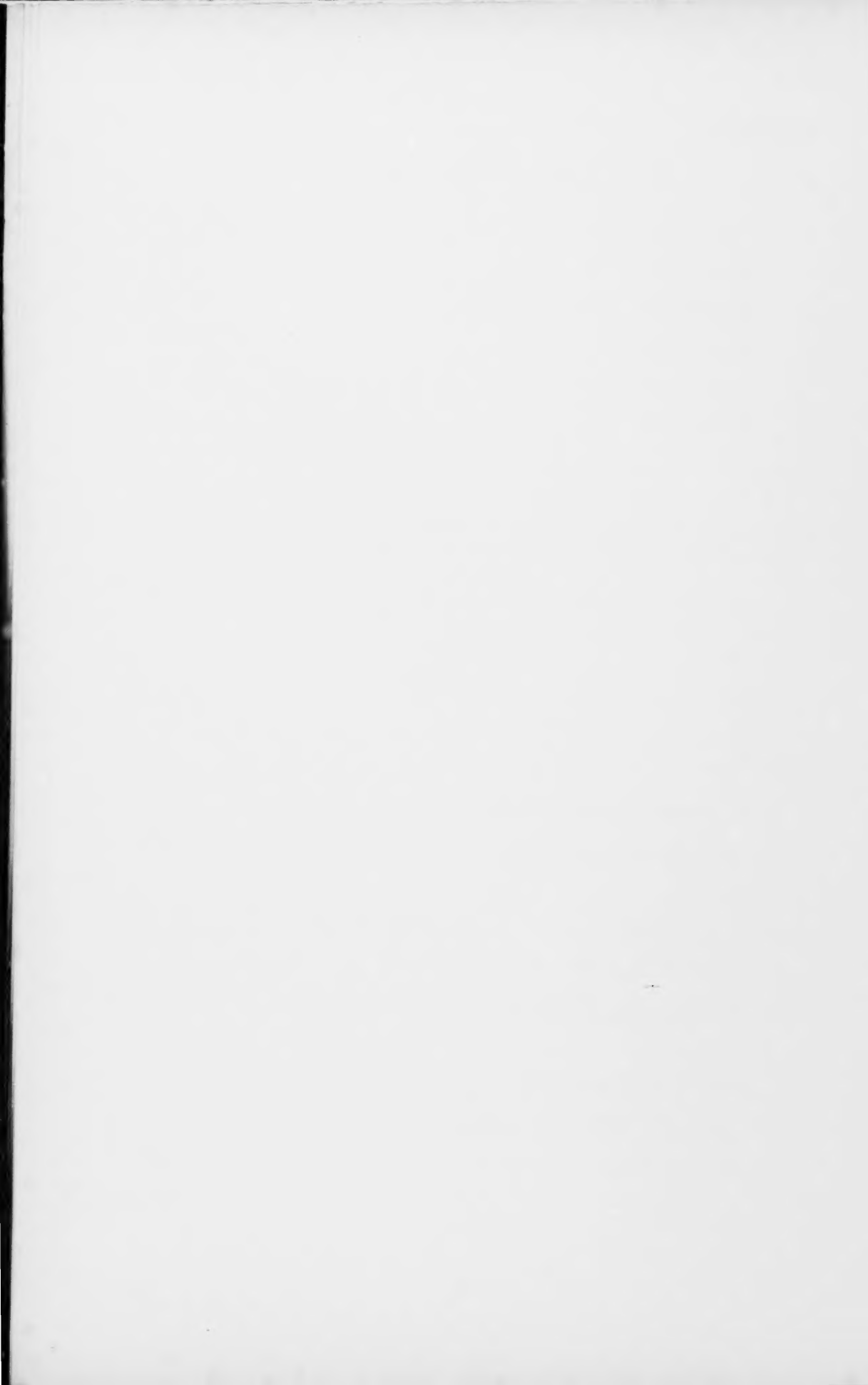
Systems for Hard Minerals," Rocky

| | |
|--|----|
| <u>Mountain Mineral Law Institute.....</u> | 34 |
|--|----|

J. Adams & Barringer The Law of Mines

and Mining in the United States, 188

| | |
|-------------|----|
| (1877)..... | 40 |
|-------------|----|



Laws of Nevada, Seventh Sess., Chap.

LVII, "An Act to encourage the
mining, milling, smelting, or other
reduction of ores in the State of
Nevada," approved March 1, 1875.-
p.48 herein of petition.



CITATIONS FOR OPINIONS
DELIVERED IN THE COURTS AND
THE INTERIOR DEPARTMENT

U.S. v. Frank Sullivan, Nevada No.
065733

U.S. v. Sullivan, I.B.L.A. 72-273,
9 I.B.L.A. 278

Robert L. Mendenhall v. U.S.,
Dist. Ct. Nevada, CV-R-80-146-ECR (1982)

Mendenhall v. U.S., Ninth Cir.
Ct. of Appeals, No. 83-1751 (1984);
Rehearing denied June 28, 1984.



JURISDICTION

The United States District Court for the District of Nevada had jurisdiction over this matter by virtue of the Administrative Procedures Act, 5 U.S.C. Section 701, et seq. and 28 U.S.C. Section 1331, et seq., which authorize and restrict judicial review of a decision by an administrative law judge and the Interior Board of Land Appeals.

The judgment of the Court of Appeals for the Ninth Circuit, affirming the Federal District Court, was entered on May 1, 1984. Petition for rehearing was denied by order dated June 28, 1984.

Orders Extending Time to File Petition for Writ of Certiorari were granted by Associate Justice of the Supreme Court of the United States, William H. Rehnquist. This petition for Certiorari is timely filed on or before the extension dates granted in said orders, first to October 26, 1984, then to November 5, 1984.



This courts' jurisdiction is
invoked under 28 U.S.C. Section 1254
(1), and the Fifth Amendment of the U.S.
Constitution.



CONSTITUTIONAL PROVISION

and

STATUTES INVOLVED

1. **Constitutional Amendment V**

No person . . . shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 30 U.S.C. §21, 22, 26, & 35 -CHAPTER 2

Mineral Lands and Regulations in

General. §22 is set forth below:

**§ 22. Lands open to purchase by
citizens**

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

R.S. Section 2319; Feb. 25, 1920, c. 85 Section 1, 41 Stat. 437.



3. 30 U.S.C.A. Section 161 (known as the Building Stone Act)

§161. Entry of building stone

lands; previous law unaffected

Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims. Lands reserved for the benefit of the public schools or donated to any States shall not be subject to entry under this section. Nothing contained in this section shall be construed to repeal section 471 of Title 16 relating to the establishment of national forests.

Aug. 4, 1892, c. 375, §§ 1, 3, 27
Stat. 348

4. 30 U.S.C.A. Section 611 (known as the Common Varieties Act).

§611. - Common varieties of sand, stone, gravel, pumice, pumicite, or cinders and petrified wood.

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the

United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit.

"Common varieties" as used in sections 601, 603, and 611 to 615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" as used in sections 601, 603, and 611 to 615 of this title means agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter.

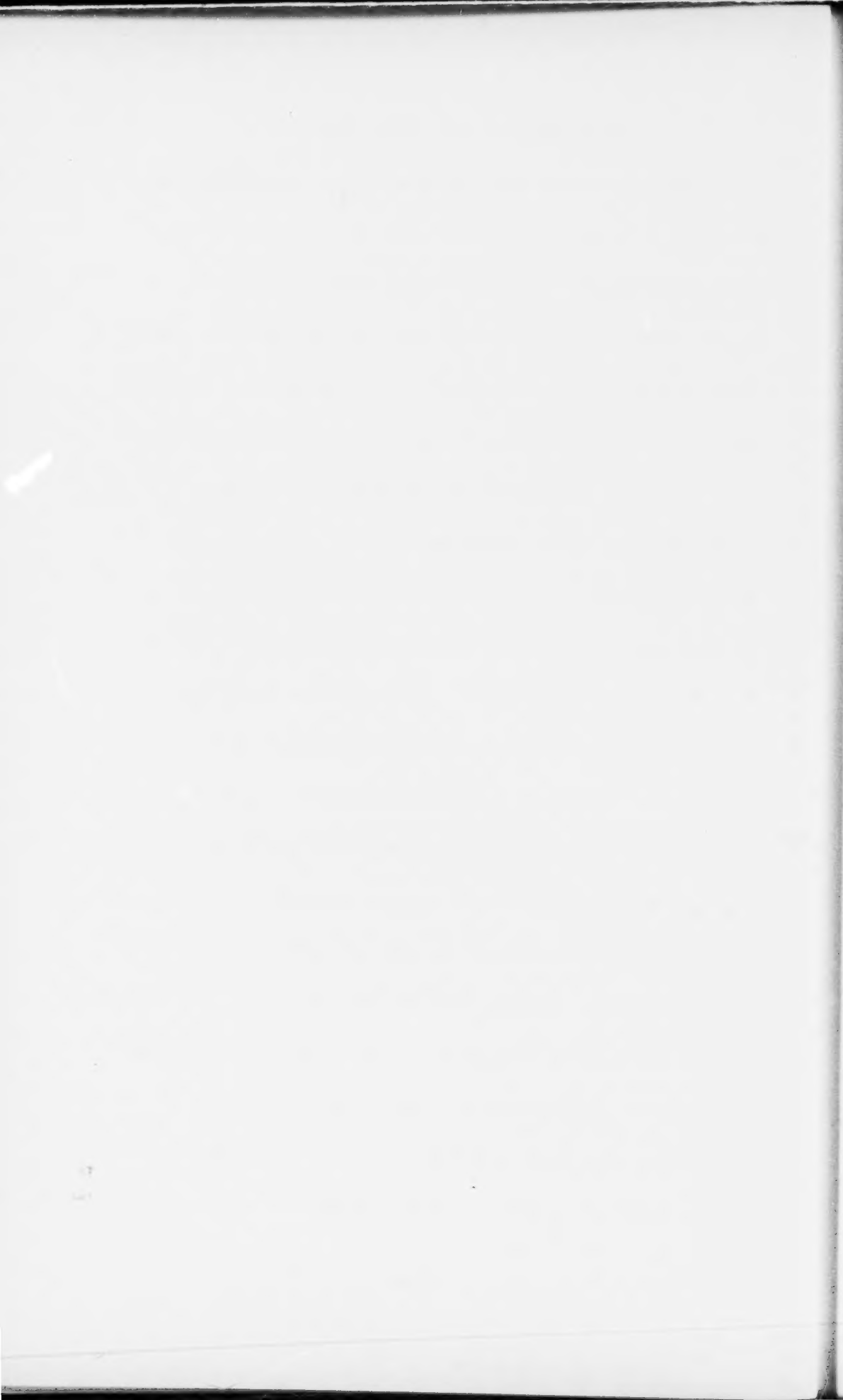
July 23, 1955, c. 375, Section 3, 69 Stat. 368; Sept. 18, 1962, Pub. L. 87-713, Section 1, 76 Stat. 652.



STATEMENT OF THE CASE

Petitioner purchased the unpatented mining claims hereinafter referred to as the Charleston 24/39 located approximately 12 road miles northwest of the city of Las Vegas. The claims, more particularly described in the records of the Bureau of Land Management, were located by E.H. Brawner, et. al. on February 28, 1955, and were part of a group known collectively as the "Charleston Claims". Frank R. Sullivan acquired the "Charleston Claims" on April 9, 1959. Sullivan mined in the area and subsequently quitclaimed a large group of Charleston claims, not including the Charleston 24/39, to Charlestone Stone Products Co.

In 1965, Donald G. Fisher, a mining engineer employed by Respondent to examine mining claims in the Las Vegas area and to invalidate those in



violation of Title 30 U.S.C., §611, reported that the Charleston claims were invalid for want of a "discovery". Consequently, Respondent brought contests against Charlestone Stone Products Co. and Petitioners' predecessor, Frank R. Sullivan. Fisher testified in the Bureau of Land Management (BLM) hearing against Charlestone Stone Products Co. but was transferred to another area department of the BLM before the hearing in U.S. v. Frank Sullivan¹. He was replaced by Thomas E. Schessler as Lands and Minerals staff Officer with the Las Vegas District of the BLM, to become sole witness against the Sullivan claims. In both U.S. v. Charlestone and U.S. vs. Sullivan, the hearing examiner

1. U.S. v. Frank Sullivan, Nevada No. 065733



ruled the Charleston claims null and void and the Interior Board of Land Appeals affirmed.

Upon judicial review in Charlestone Stone Products Co. v. Morton² the District Court ruled that at least sixteen of the Charlestone claims were valid. On May 12, 1979, in Charlestone Stone Products v. U.S.,³ the higher court concurred, reversing Respondent's invalidation of the mineral discovery. Andrus v. Charlestone Stone Products Co.⁴ followed; but the Supreme Court decided only that water on the Charlestone claims was not locatable

2. Charlestone Stone Products Co. v. Morton, Civil No. LV-2039 BRT (D. Nev., November 7, 1974)

3. Charlestone Stone Products v. U.S., No. 75-1532, Ninth Cir. Ct. of Appeals, decided May 12, 1977; order clarifying remand dated Jan. 3, 1979 (see appendix).

4. Andrus v. Charlestone Stone Products Co., 436 US 604 (1978)

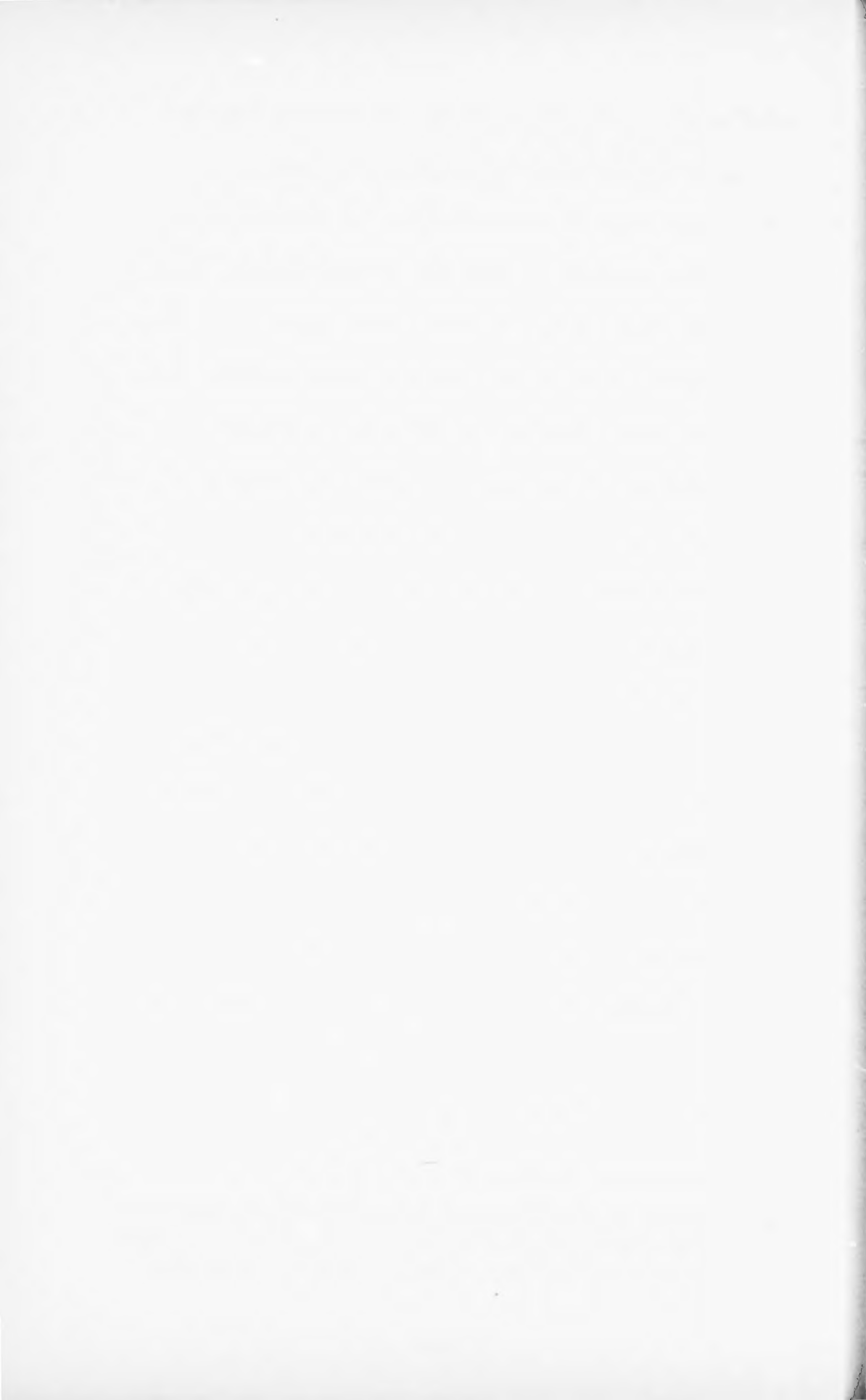


under Title 30 §22. In a June 28, 1978 letter, the U.S. Department of the Interior, Office of the Solicitor, wrote that the Supreme Court did not alter the Ninth Circuit's holding with regard to the mineral discovery on the Charlestone claims and that the matter should be remanded to the Department of the Interior for further proceedings; and the Ninth Circuit clarified its remand on January 3, 1979. Patent for the Charleston Nos. 1-22 mining claims was subsequently applied for and granted.

Meanwhile, Petitioner, Robert L. Mendenhall, had purchased from Sullivan the Charleston 24/39 (see Mendenhall's District Court Affidavit in appendix). Mendenhall proceeded to mine the aggregate from the Charleston 24/39 on a large and profitable scale and evidence presented in Robert L. Mendenhall v. U.S.,⁵ that special qualities of the

aggregate, which even Respondents expert witness Schessler recognized, had overcome any disadvantages of distance from the market. The District Court flew in the face of the fact that Petitioner had developed a successful mine on the Charleton 24/39, proving Sullivan's "discovery"; and the court ignored the findings of the Ninth Circuit Court of Appeals in Charlestone Stone Products, Inc. v. U. S., supra. The District Court ruled that Schessler's feeble contention that the claims were too far from the market ever to become anything, was substantial evidence of no "discovery". On Appeal the Ninth Circuit concurred, May 1, 1984. From that decision this appeal is made.

-
5. Robert L. Mendenhall v. U.S., Dist. Ct. Nevada, CV-R-80-146-ECR, confirmed (see affidavit of geologist and mining engineer, George Kiersch in appendix)



The land in question remains open to mineral entry, so Petitioner has exercised his right to stake new mining claims on the discovery, but relying on findings against Charleston 24/39, the Respondent has instigated trespass proceedings against Petitioner.

FIRST REASON FOR ALLOWANCE OF THE WRIT

1. Respondent, in administering the mining laws, has been applying a standard of "discovery" wholly outside judicial interpretation and in opposition to the intent of Congress and the purpose of the mining laws.

Before the first federal mining laws were codified in 1866, the importance of a "discovery" on the claims was a matter of establishing primacy of possessory right. Two prospectors exploring in the same area were often racing to be the first with a mineral discovery around which one would be entitled to stake his claim and record it with the local mining district. The federal statutory authority for these mining claims proceeded after the mining laws were born of necessity in frontier mining communities. In 1866, the federal

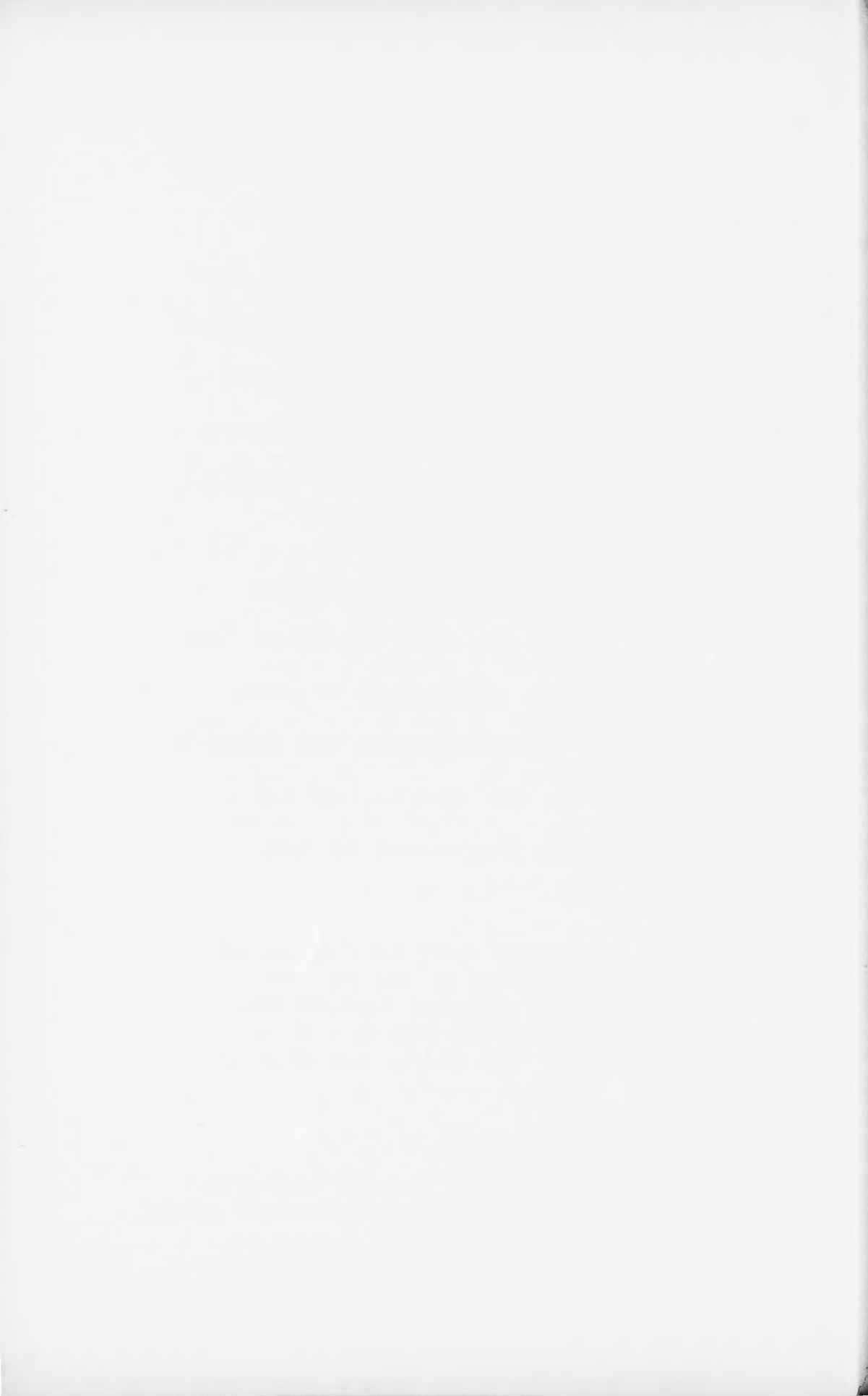


government gave statutory authority to the principle that "all valuable mineral deposits in lands belonging to the United States... shall be free and open to exploration and purchase."⁶ Congress recognized the success of the miners' own laws in facilitating the discovery and development of the nation's mineral resources.

The policy and general purpose declared by Title 30, Section 22 of the mining laws was to encourage as many people as possible to assume the hazards of searching for and extracting the valuable minerals deposited in the public lands.

It was supposed that by reason of the stimulus thus given to the production of mineral wealth and rendering the same available to commerce and the arts, the public

6. Mineral Lands and Mining 30 U.S.C Section 22.
Quoted in entirety under "Statutes Involved" herein.



would indirectly receive a compensation commensurate with the value of the grant. Thus considered, the legislation was approved as embodying a wise public policy.⁷

The Courts have consistently interpreted the intent of Congress to have been to reward and encourage the discovery of valuable minerals;⁸ and U.S. ex rel. U.S. Borax Co. v. Ickes⁹ removed any doubt as to the purpose being restricted by lode or placer qualifications of the mineral deposit. The first federal statutes recognized only a lode type of mining claim.

-
7. U.S. v. Rizzinelli, D.C. Idaho 1910, 182 F.675. See also McKinley v. Wheeler, Colo. 1888, 9 S.Ct. 638, 130 U.S. 630.
 8. Bowen v. Sil Flo, 1969, 451 P.2d 626, 9 Ariz.App. 268; Haydenfeldt v. Daney, Nev. 1877, 93 U.S. 634; Creede & Cripple Creek v. Uinta Tunnel, Colo. 1905, 25 S. Ct. 266, 196 U.S. 337; Steel v. Smelting Co., Colo. 1882, 1 S.Ct. 389, 106 U.S. 477.
 9. U.S. ex rel. U.S. Borax Co. v. Ickes, 1938, 98 F.2d 271, 68 App. D.C. 399, cert den 59 S. Ct. 80, 305 U.S. 619.



Placer claims became part of the statutes thereafter, and Petitioner's mineral deposit has been properly located under the law for placer mining claims.¹⁰

The purpose of the federal mining statute known as the "Common Varieties Act" of July 23, 1955,¹¹ is no different than the purpose of the mining laws in general. In U.S. v. Coleman¹² in 1968, the Supreme Court affirmed the continuing intent of Congress to encourage mining even in consideration of common varieties of mineral. Within the context of this purpose, the Common Varieties Act was to solve a particular

10. Mineral Lands and Mining, Title 30, U.S.C., Sec. 35.

11. Ibid., Title 30, U.S.C., Section 611, quoted in "Statutes Involved" herein.

12. U.S. v. Coleman, Cal. 1968, 390 US 599, 88 S Ct 1327, reh den. 391 US 961, 88 S Ct 1834, 391 U.S. 961, cert den 89 S.Ct. 1014, 394 U.S. 907.



problem. According to testimony by Clifford Young, member of Congress and of the House Interior and Insular Affairs Committee at the time the Act was drafted:

" . . . People were using the right to locate mining claims for purposes not connected with bonafide mining purposes, . . . People would locate claims for a cabin for recreational purposes or to tie up a good trout stream. Other land was located for commercial purposes to establish a site for a service station or curio shop. .

The bill was strongly supported by the mining industry . . . they wanted to preserve as large an area as possible of the type of materials that would be subject to location in the traditional way . . . " ¹³

The remedial legislation removed as of July 23, 1955, "common varieties" of mineral, specifically "sand, stone, gravel, pumice, pumicite or cinders and petrified wood" from location under the

13. U.S. v. Guzman, Arizona Contest Nos. A-035688 and A-035690 (1973).



mining laws. Even so, the Act exempted "common varieties" having "distinct and special value," leaving undisturbed the idea that a discovery of valuable mineral on the public lands should be open to exploration and development by bona fide prospectors.

In the administration of the Common Varieties Act, however, the new effort to define a "discovery" created complexities wholly out of keeping with the simple issue of good faith which the act of July 23, 1955 and the mining laws in general had intended.

In 1893,¹⁴ the Courts first interpreted the meaning of "valuable mineral deposit" (30 U.S.C. Section 22). One year later in Castle v.

14. Book v. Justice Mining Co., 58 F. 106, 124-25 (C.C.D. Nev. 1893).



Womble,¹⁵ the land department enunciated what would become known as the "prudent man rule:"

"Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine . . . to hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby "all valuable mineral deposits in lands belonging to the United States . . . are . . . declared to be free and open to exploration and purchase. For, if as soon as minerals are shown to exist, and at any time during exploration, before the returns become remunerative, the lands are to be subject to other disposition, few would be found willing to risk time and capital in an attempt to bring to light and make available the mineral wealth, which lies concealed in the bowels of the earth, as Congress obviously must have intended the explorers should have proper opportunity to do."

15. Castle v. Womble, 19 Pub. Lands Dec. 455 (1894) approved by the Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905).



Petitioner's predecessor was the only witness in his own behalf at the hearing in U.S. v. Sullivan, Nevada No. 065733. The testimony leaves little doubt that Sullivan was developing in good faith what he called his "best gravel" on the Charleston 24/39. He and his predecessors before him and before passage of the Common Varieties Act in 1955 had, in fact, made sales from the Charleston claims. Sullivan's testimony as to sales and development was virtually un rebutted. Thomas E. Schessler, sole witness for Respondent, without benefit of supporting fact, simply delivered the opinion that the deposit was too far from the market to justify "the expenditures of labor and means, with a reasonable prospect of success in developing a valuable mine." Schessler had no knowledge of the advantages which the special value of



the deposit had in the marketplace, nor did he present any evidence that his opinion was based on any but one of the multitude of factors which effect the market for a mineral. Furthermore, according to Chrisman v. Miller, supra;

"Standards to be applied in determining what a prudent prospector would or would not do are not those of a trained engineer or geologist"

Verrue v. U.S.¹⁶ should have constrained the Respondent from pursuing an invalidation of Petitioner's mining claims. In Verrue absence of actual sales before the critical date of July 23, 1955, was not allowed to control in determining marketability, although the lack of sales was admittedly persuasive, depending upon the facts of the particular case.¹⁷ Sullivan's testimony

16. Verrue v. U.S., 457 F.2d 1202 (1972).



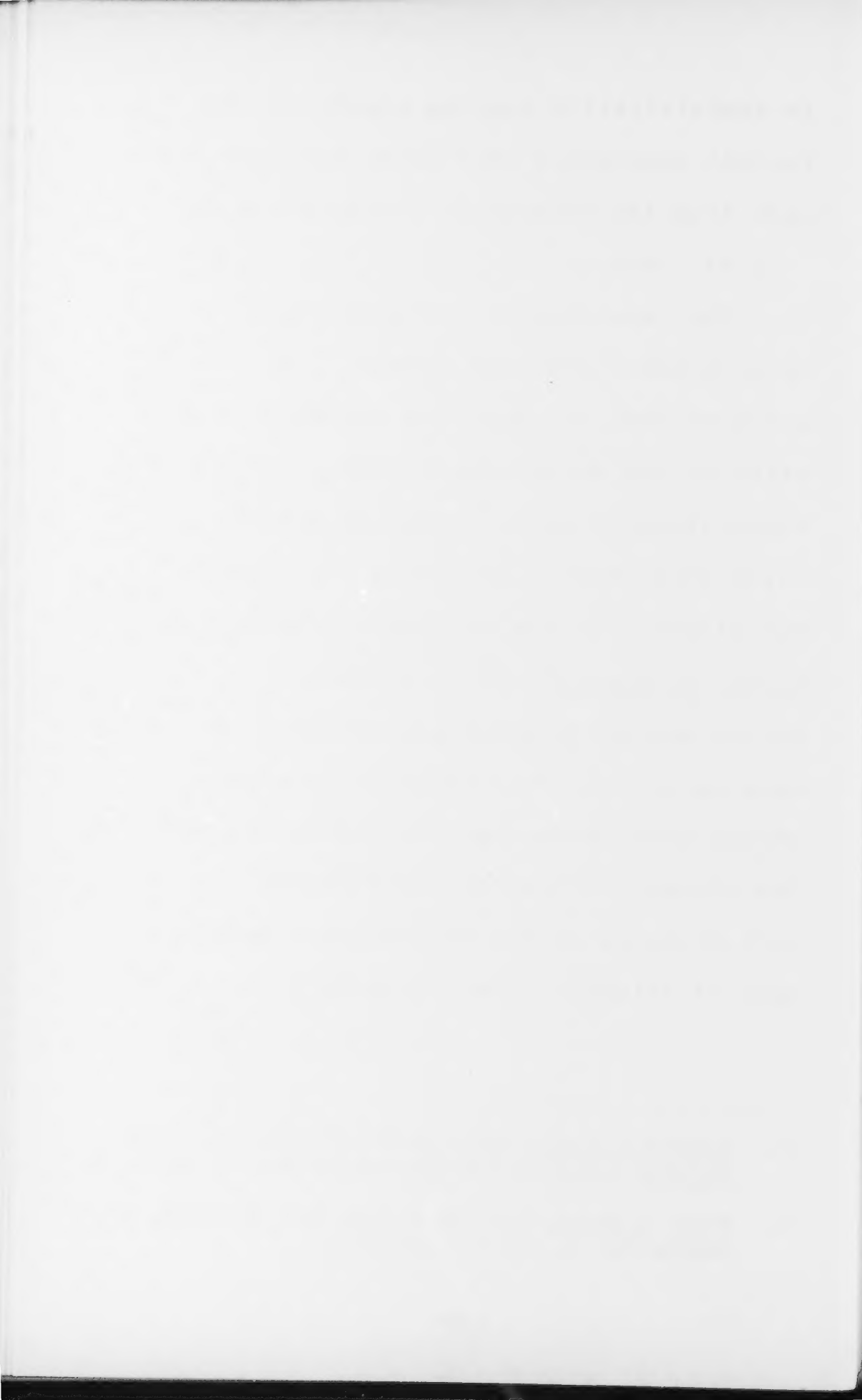
in administrative hearing supported the factual conclusion that sales had been made from the Charleston claims prior to July 23, 1955.

The idea that Mr. Schessler's opinion could overcome substantial evidence that Mr. Sullivan had made sales to the market arose from administrative habit involving claims which were made in bad faith for "common varieties". In the Las Vegas area Foster v. Seaton¹⁸ is an example.

Foster did not present any evidence of developing a mineral deposit, he simply showed that there was sand and gravel on the claims and that he could foresee circumstances in the future which might make it valuable. Out of cases like

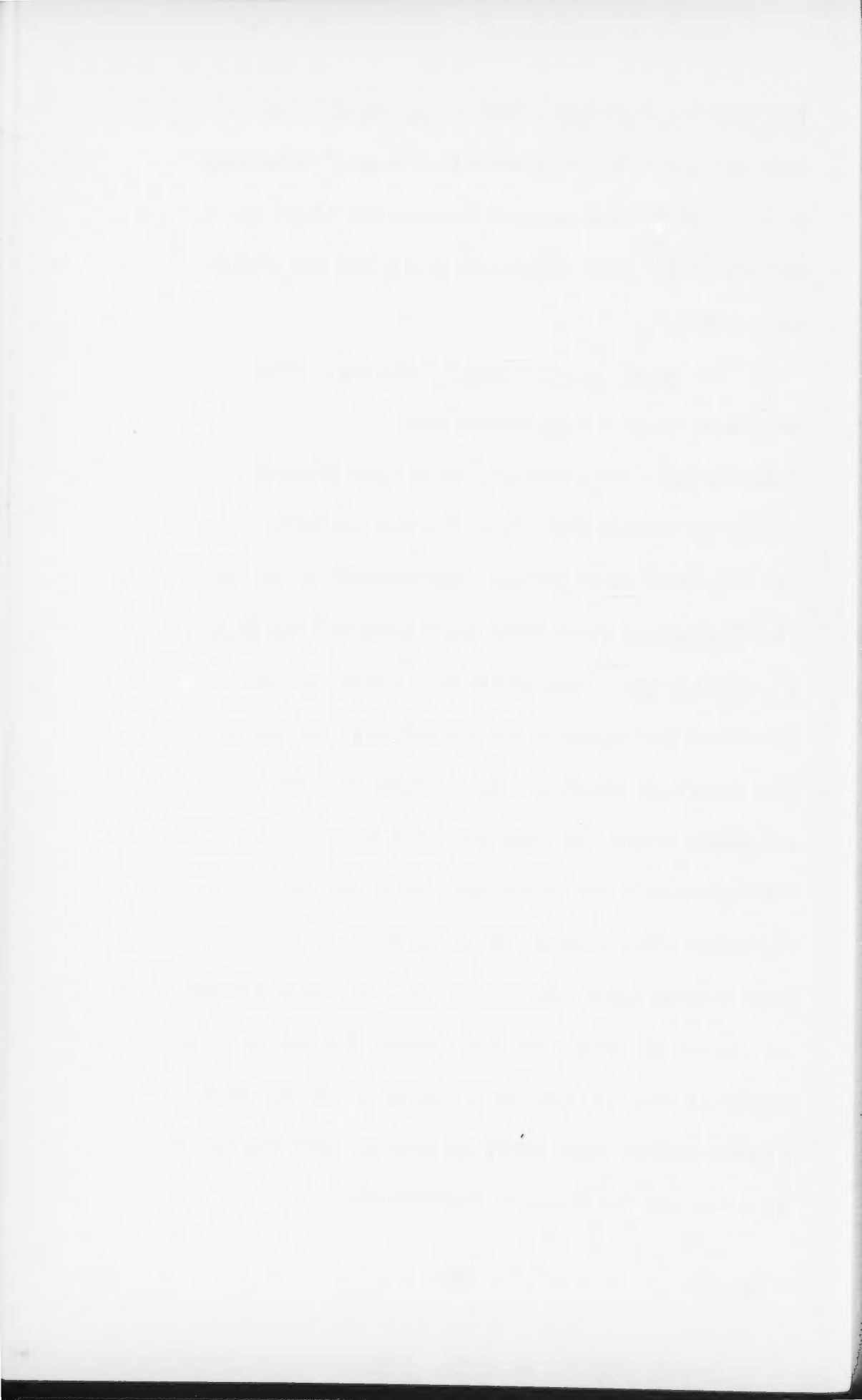
17. Edwards v. Kleppe, 588 F. 2d 671, 673 (9th Cir. 1978);
Melluzzo v. Morton, 534 F.2d 860-863 (9th Cir. 1976).

18. Foster v. Seaton, Dist. Ct. of App., D.C., No.14953, decided Oct. 22, 1959 (see appendix).



Foster v. Seaton came what would be called the "marketability test" whereby a claimant was asked to prove that a market for the deposit existed on July 23, 1955.

In U.S. v. Coleman, supra, the Supreme Court approved the "marketability test", but the Court clearly found Coleman to be in bad faith, and one other important fact of the Coleman case was not shared by U.S. v. Sullivan. Coleman was challenged because he sought to purchase or patent his mining claim. Sullivan did not propose that he had proven his "discovery" so conclusively as to warrant the issue of a patent. After his claim was invalidated, he continued to develop what he believed to be a deposit of valuable mineral, as is his right under the mining laws; and he sold the claim to Robert Mendenball,



Petitioner, who shared Sullivan's evaluation of the deposit and proceeded to develop a paying mine.

Evidence presented to the Federal District Court (affidavits in appendix of Petitioner and George Kiersch, geologist and engineer) proved that the Respondent erred in its invalidation of Petitioner's claims. Furthermore, the Appellate Court decision in Charlestone Stone Products v. Secretary of the Interior Cecil D. Andrus, supra, disallowed probative value to the type of mineral examination which Respondent's witness conducted.

The Charlestone decision should have effectively put an end to the habit of Respondent making a prima facie case out of the opinions of men like Schessler, who are inexperienced in the marketplace and who come into an area as much as ten years after the period of



time about which they are asked to testify.¹⁹ Like Charlestone Stone products, Petitioner is a good-faith entryman on the public lands. In addition the mineral deposit which the Court validated in the Charlestone case is the very same mineral for which Petitioner's claims were located.

There can be little doubt that U.S. v. Sullivan does not serve the purpose of the mining laws. Does it contribute to some alternative to free mining which Respondent may be proposing for developing the nation's mineral resources? Maybe Respondent seeks to administer the deposit by selling it to the highest bidder or otherwise lease

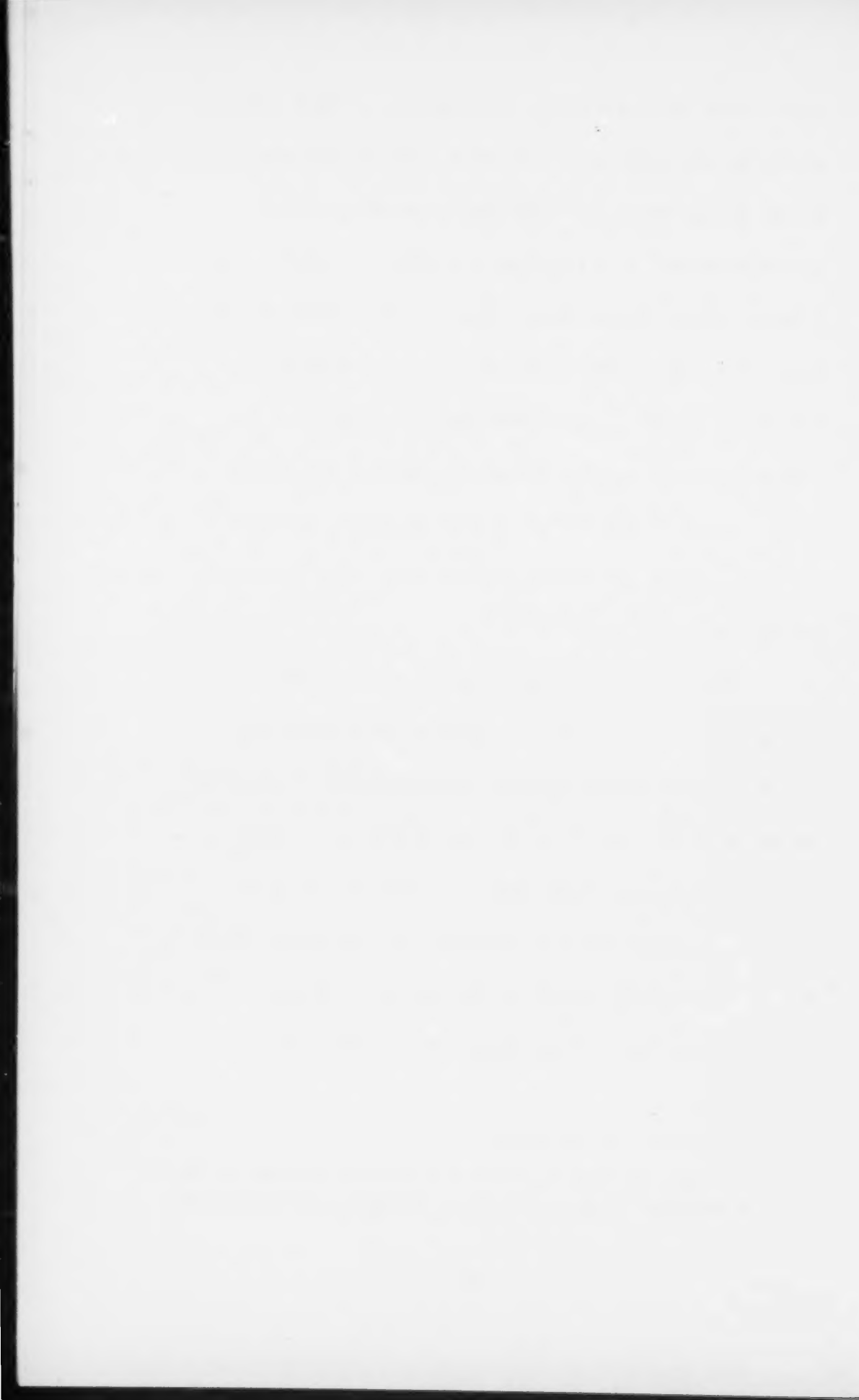
19. U.S. v. Boyle 519 F.2d 551 (9th Cir. 1975); U.S. v. Johnson, I.B.L.A. 78-507 (Feb.28,1979); U.S. v. Snyder U.S. Dist. Ct., Dist of Colo., Civil Action No. 66-C-131, decided Apr.8,1967; (10th Cir. Ct. decided May 24,1969).



the land for mining purposes. The Court should be advised of the costs which such programs by the Respondent have encountered historically and today. In 1845, when President Polk considered the cost of leasing the nation's lead mines, he sold them. The amount collected in lead mine rentals was exceeded by more than four times for a four year period²⁰ by the cost of administering the leasing program.

The nation's gas and oil resources, originally locatable under the mining laws, have been under government leasing programs since the early 1920's. The United States now imports most of its oil although it is common knowledge that huge deposits remain to be developed domestically. The Appellate Court in

20. Hansen, Clinton J., "Why a Location System for Hard Minerals," (Rocky Mountain Mineral Law Institute).



Arkla Exploration Co. and the State of Arkansas v. Arkansas-Texas Oil and Gas Corporation and James G. Watt²¹ appears to be attempting to hold Respondent responsible for the failures of its leasing program and a new Government Accounting Office Report²² concludes that although reasonable in concept, Respondent's emergency coal leasing regulations have been "difficult to administer within a competitive framework."

Administration of the Common Varieties Act in such a way as to increase the number of mineral deposits unavailable to those who would privately explore and develop the nation's mineral

21. Arkla Exploration Co. and the State of Arkansas v. Arkansas-Texas Oil and Gas Corporation and James G. Watt, 734 F.2d 347 (1984).

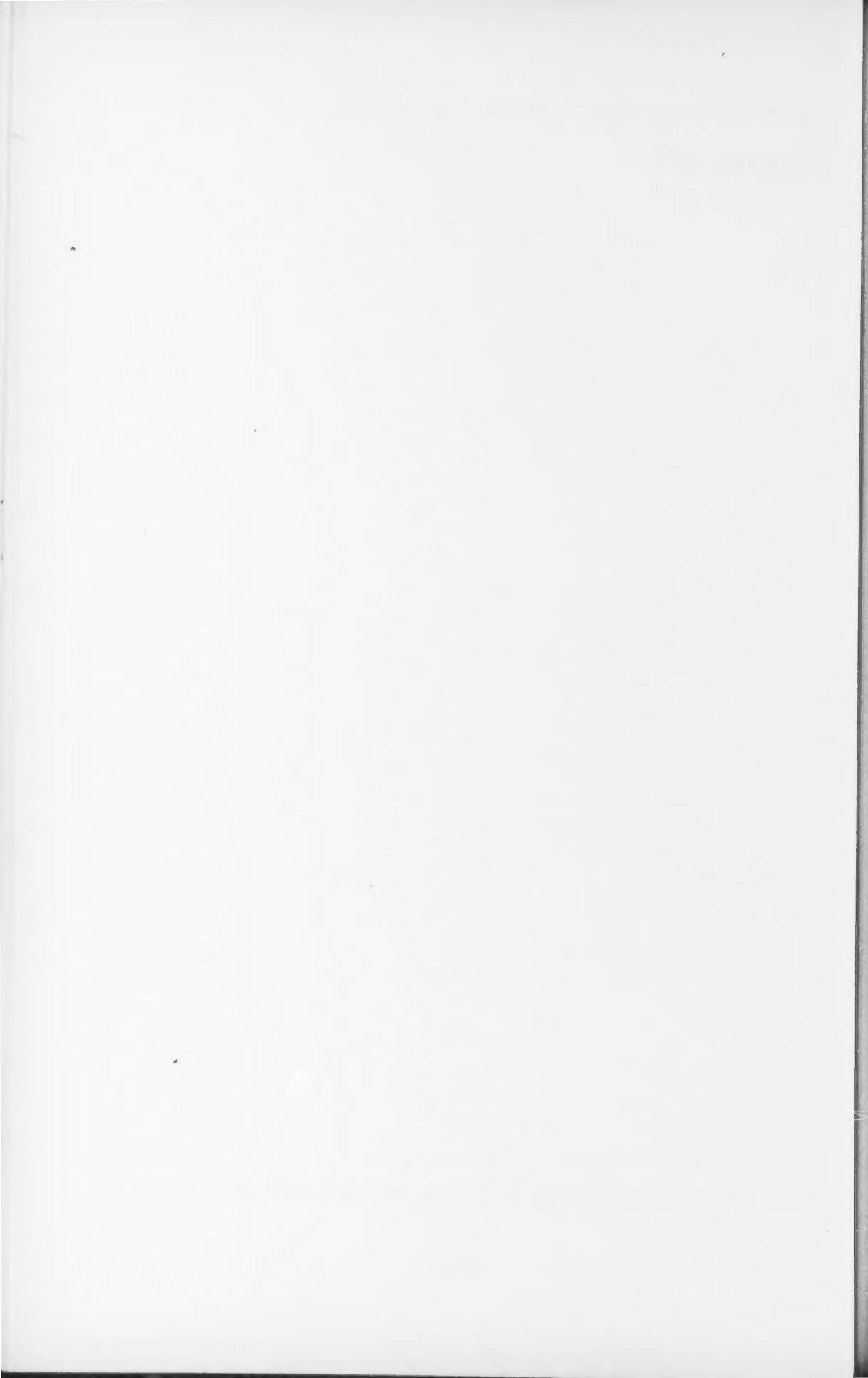
22. Government Accounting Office Report, GAO/RCED-84-17, August 2, 1984.



resources, is foolhardy and against the intent of Congress and the interpretation of the Common Varieties Act by the Courts. Under the law, deposits of valuable mineral on the public lands are free and open to bona fide mineral entryman like Petitioner. Respondent, however, has succeeded in convincing the Courts below that its "marketability test", when applied to mineral entryman who have provided substantial evidence that they are in good faith exploring and developing mineral on the public lands, is within the letter of the law. Clearly, the purpose of the mining laws is not served in approval by the Courts of U.S. v. Sullivan. Petitioner urges the Supreme Court to consider the familiar rule "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit,

nor within the intention of its
makers."²²

22. Holy Trinity Church v. U.S., 143 U.S. 457, 459 (1892).



SECOND REASON FOR ALLOWANCE OF WRIT

2. Due process requires that agency discretion be judicially reviewed as to the facts in a condemnation without compensation and with no higher purpose contemplated for the condemned property.

The mining laws have not changed in their purpose since they were enacted, but the laws are seldom fortified by court interpretation because increasingly the courts have elected to refuse to review or rehear the facts. The Courts below, in sympathy with sovereign immunity, were willing to leave agency discretion unchallenged in U.S. v. Sullivan despite factual evidence that Petitioner's property was being unlawfully seized. Best v. Humboldt Placer Mining Co.²⁴ has

24. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335 (1963).

frequently been relied upon for court approval of land agency immunity.

According to Best v. Humboldt:

If a patent has not issued, controversies over mining claims should be solved by appeal to the Land Department and not to the courts.

In Best v. Humboldt, the invalidated mining claims were to become part of the Trinity River Dam and Reservoir in California. The invalidation proceedings on the Humboldt claims were for purposes of determining whether a property right existed for which compensation was due. Petitioner has not been advised of the modicum of proof which Respondent required of Humboldt Placer Mining Co., but where Best v. Humboldt has shielded the Department of the Interior from making compensation for the taking of mining claims which have been developed in good faith, Petitioner wishes to supply a



measure of historical perspective for the Court. When the railroad and highway builders moving across the country attempted to devalue the mining claimant's work and worth, they were stopped in the courts by the mining law because the courts and due process were still available to the mining claimant²⁵. Years of administrative procedure and expense did not intervene, and the uncertainty of the value of mining land did not deprive it of the possessory title to monetary worth and protection.²⁶

In determining which procedural safeguards must be afforded Petitioner, the Court must consider the extent to

25. Zeigler v. South & North Ala. R.R. Co., 58 Ala. 594, 599 (1877).

26. Montana Ry. Co. v. Warren, 137 U.S. 348, 352-53 (1890). See also J. Adams & Barringer, The Law of Mines and Mining in the United States, 188 (1877).

which Mendenhall might suffer grievous loss, the nature of the government function involved, and the nature of the private interest affected - the criteria formulated in Morrissey v. Brewer.²⁷

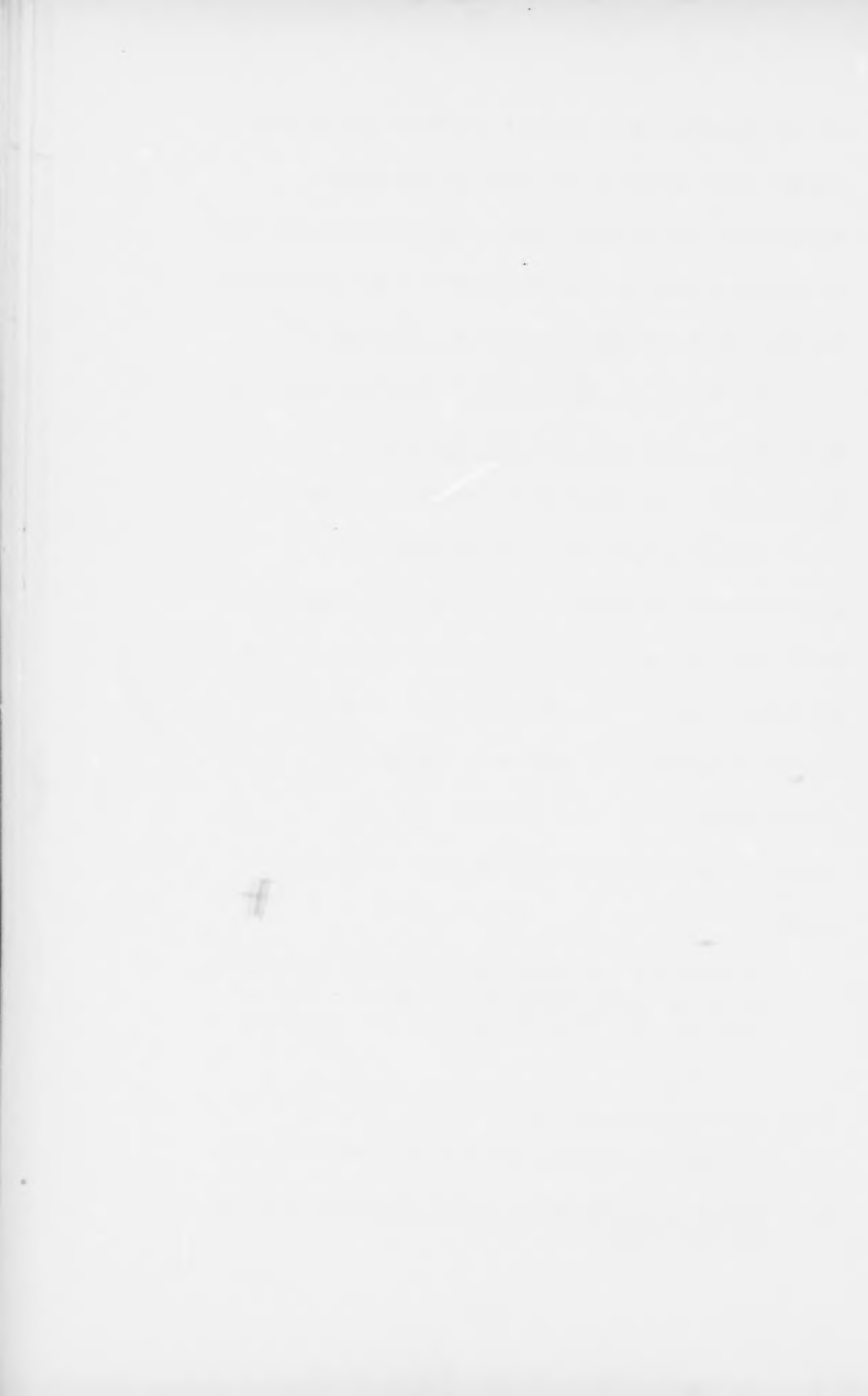
In Best v. Humboldt, *supra*, and in Wilbur v. United States ex rel.

Krushnic, the Supreme Court has held that unpatented mining claims are possessory mineral interest in land, as well as "property in the fullest sense of that term."²⁸ Similarly, the Ninth Circuit Court of Appeals recently concluded that the holder of an unpatented mining claim has a property right:

(b)ecause an unpatented mining claim is a unique form of property which created in the owners a possessory

27. Morrissey v. Brewer, 408 U.S. 471, 481-82 (1972).

28. Wilbur v. United States ex rel. Krushnic, 280 U.S. 306, 317 (1930).



interest in the land, the loss of such an interest would constitute a substantial injury."²⁹

The extent of the loss to Petitioner is "property" by Supreme Court interpretation and thereby it is entitled under the Fifth Amendment of the U.S. Constitution to due process before Respondent can take it.

Morrissey v. Brewer, supra, instructs the courts to examine the nature of the governmental function involved in the taking of the property. In Best v. Humboldt, supra, the function of the government was to examine title prior to condemnation for a dam and reservoir. In U.S. v. Sullivan the government function is not

29. Western Mining Council v. Watt, 643 F.2d 618, 628 (1981). See also: Madison D. Locke v. Watt, U.S. Dist. Ct., Nevada, Civil R-82-297 BRT, decided October 21, 1983, cert. S.Ct., October, 1984.

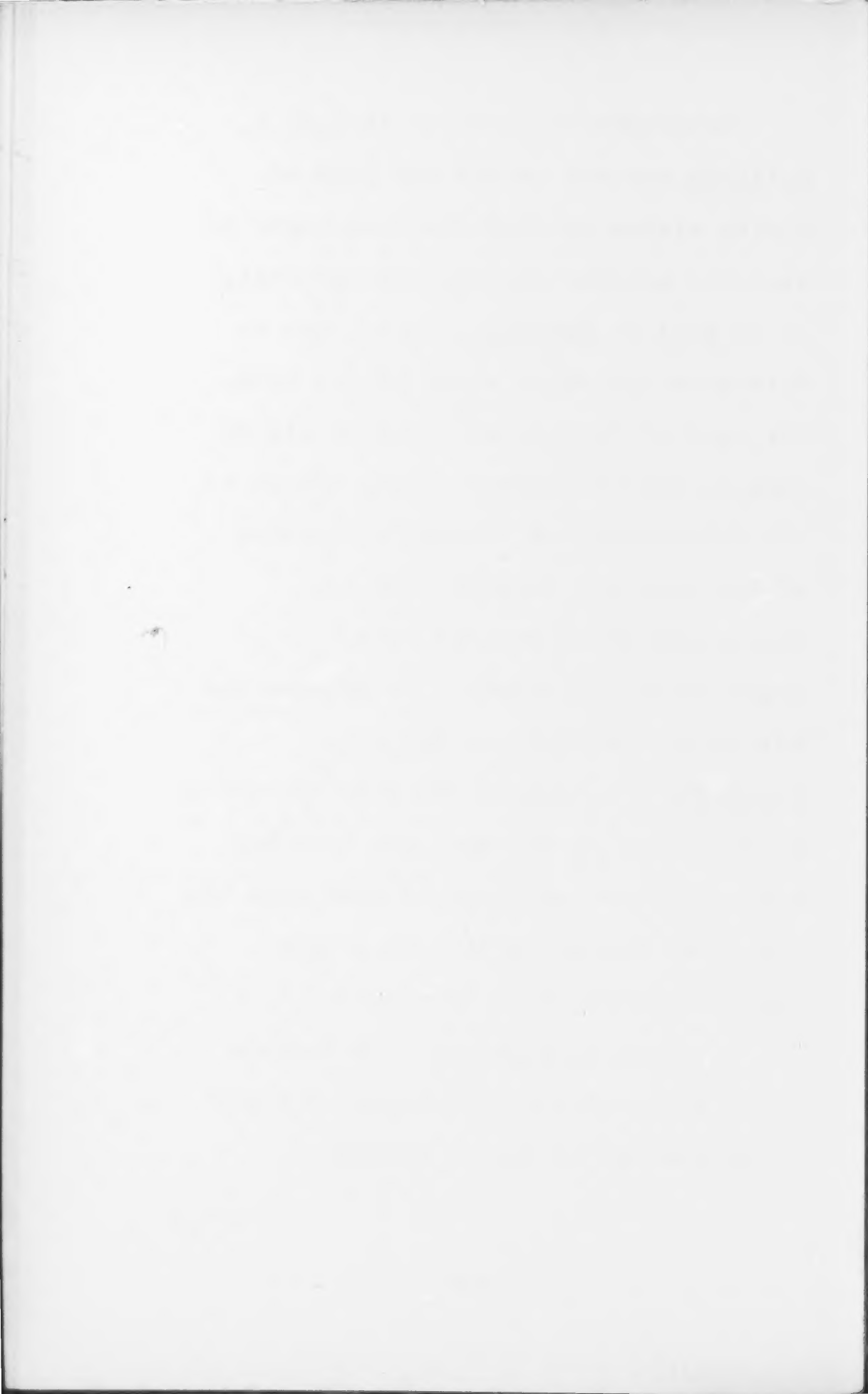
clear. The area of the Charleston claims was once part of a "small tract" classification by the Bureau of Land Management which could have resulted in the land's becoming valuable as real estate; but the area was removed from that classification because it is extremely susceptible to flash flooding and remains chiefly valuable for its mineral deposit.

The idea that development of certain deposits of mineral would be allowed only on public lands for which that mineral was the chief value came into the mining law by the Building Stone Act of 1892 (30 U.S.C. Section 161). The Common Varieties Act made no such limitation, the Common Varieties Act was to remove no valuable deposit of mineral located as of July 23, 1955, from the functioning of the general mining law.



Respondent's function in U.S. v. Sullivan was not to rid the land of mining claims so that the land might be used for another purpose without cost, as in Best v. Humboldt, supra, nor to determine the chief value of the land. The land of Petitioner's mining claims remains open to mineral entry today; so the Petitioner has located new mining claims over his discovery on the Charleston 24/39 and has made application for patent. He follows the advise of the Court in Best v. Humboldt: "A locator who does not carry his claim to patent does not lose his mineral claim, although he does take the risk that his claim will no longer support the issuance of a patent."

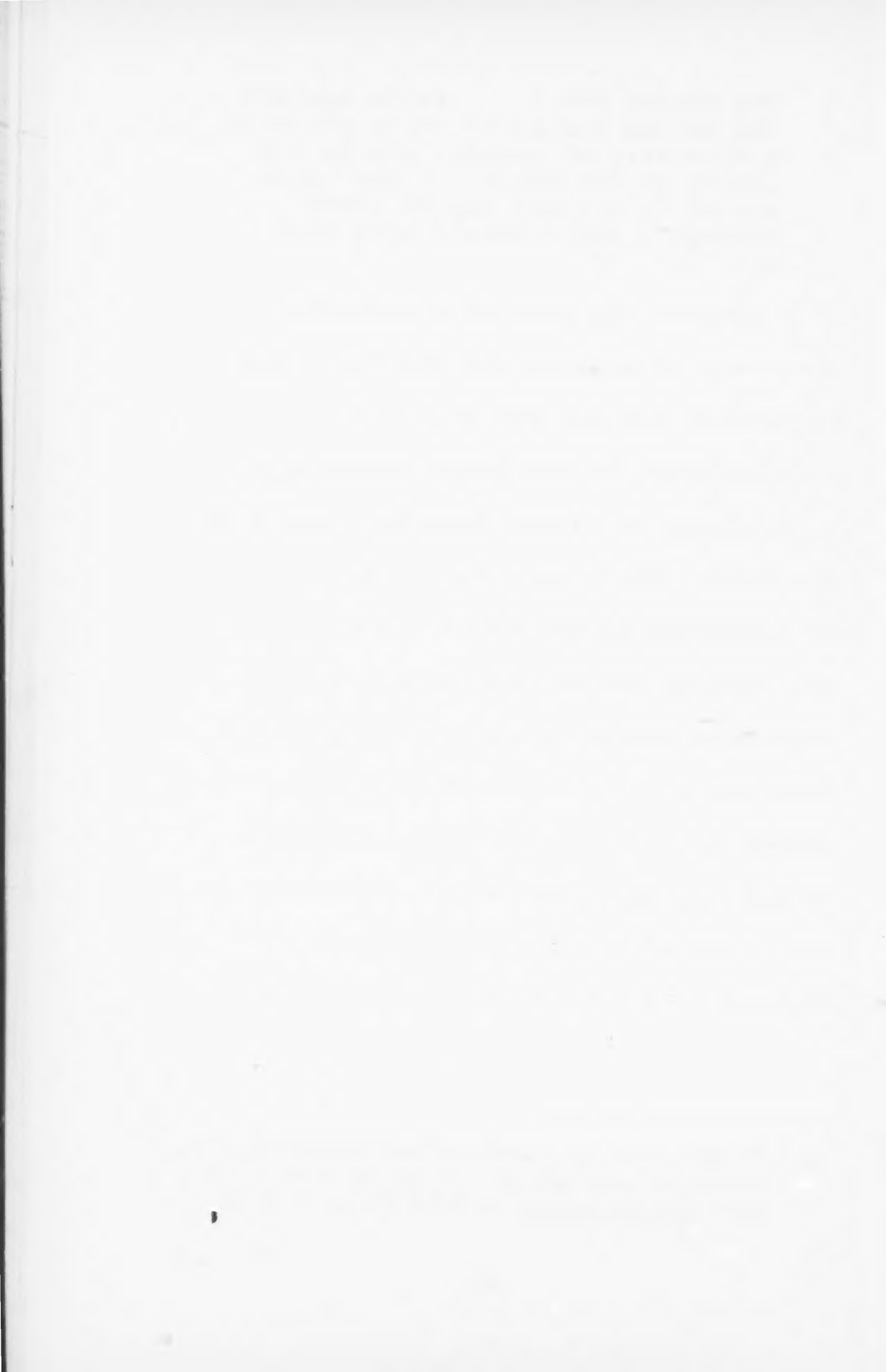
In Best v. Humboldt, the Supreme Court elaborated on the property right of an unpatented mining claimant:



The claims are . . . valid against the United States if there has been a discovery of mineral within the limits of the claim, if the lands are still mineral and if other statutory requirements have been met.³⁰

Despite the fact of a valuable discovery of mineral and the fact that Petitioner has met all statutory requirements, if the Court allows U.S. v. Sullivan to escape judicial review of the facts, Petitioner fully expects to be compelled by Respondent to carry his mining claims through administrative procedure and into the courts once again. The Respondent will undoubtedly interpret the invalidation in U.S. v. Sullivan as res adjudicata on the issue of whether Petitioner's deposit is a common variety of mineral,

30. 30 USC 21,22,26; General Mining Regulation of the Bureau of Land Mgt, 43 CFR §§ 185.1-185.3. See also: U.S. vs. Deasey, 24 F.108 (D. Idaho 1928).



which cannot be located after July 23, 1955, or a mineral with special and distinct value, exempt from the Common Varieties Act. The fact that Sullivan's claims and the discovery of the valuable mineral deposit were prior to July 23, 1955, will be virtually lost to Sullivan's predecessor in interest, Petitioner Robert Mendenhall. Absent a function for the invalidation of Sullivan's claims, if this Court confirms U.S. v. Sullivan, Respondent will have succeeded in making a mockery of the mining laws and of entrymen rights to due process of law with relation to mineral exploration and development on the public lands.

Finally, Morrissey, supra, recommends that due process be safeguarded by a factual review of the findings in administrative tribunals where required by the nature of the



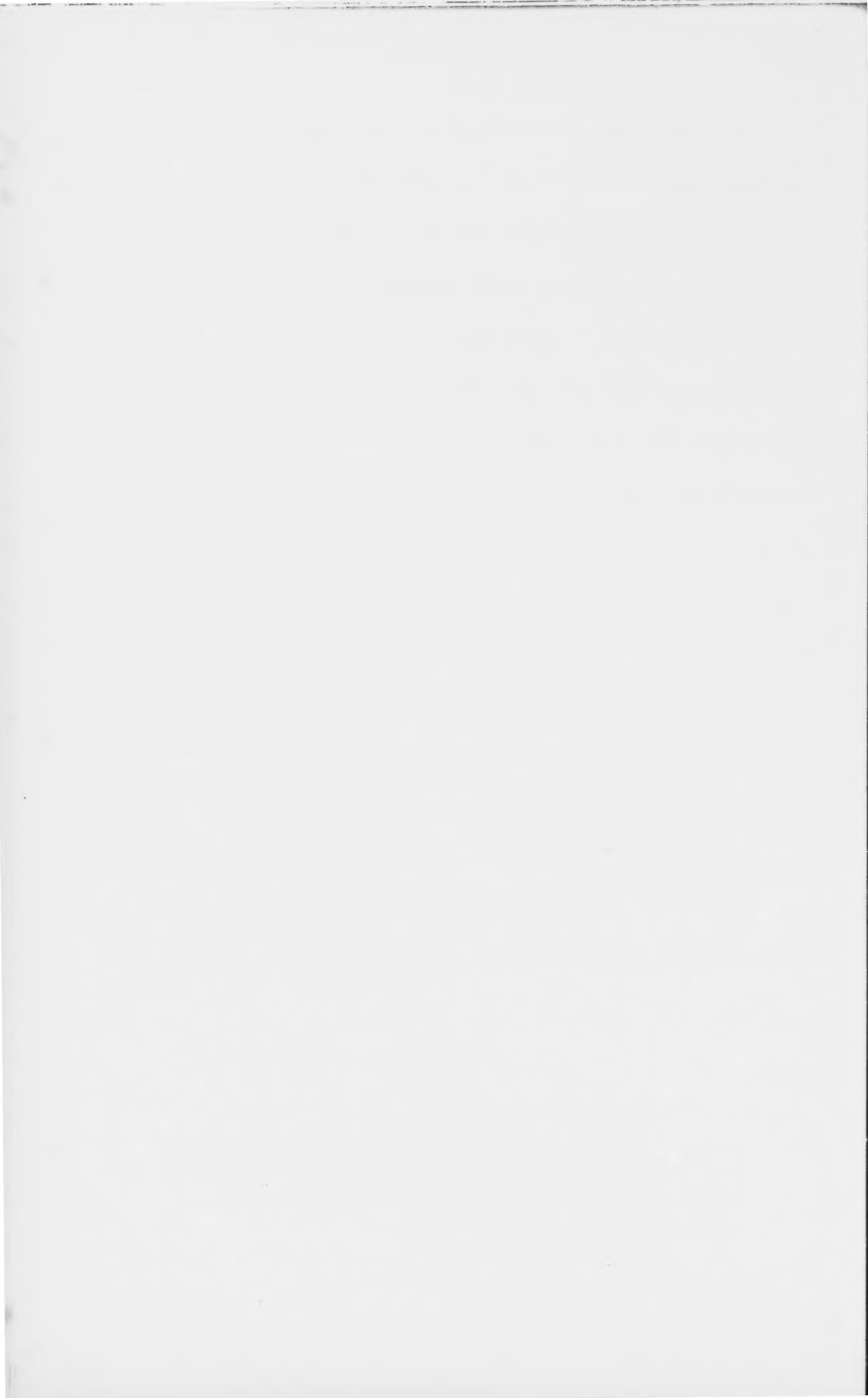
private interest affected. Without due process protection for mining claims, investors in the mineral industry are without any security for their investment in what is otherwise such a high-risk that the nation's mineral industry is being seriously curtailed.

Respondent, in its opposition to the mining laws, which it has been sworn to uphold, has become another enemy in a business fraught with enemies - weather, difficult terrain, vandals, uncertainty of sufficient quantity and quality, cyclical mineral prices and varying costs of labor and materials. The Courts have recognized the hazards in their interpretation of the law, U.S. v. Rizzinelli, supra, and the testimony of Sullivan in U.S. v. Sullivan confirms that the Charleston 24/39 claims were not free from any of these hazards.



Furthermore, respect for local custom and state law is one of the important components of the federal mining laws. Even the amount of acreage allowed within a mining claim was left to the discretion of the local mining district in the 1866 federal mining laws; and the 1872 laws left the width of a lode claim to matters of individual terrain and to the custom by which miners had marked the particular countryside and mineral deposits. In the western states, such as Nevada, the mining industry has been at the crux of economic development and in recognition of that fact, Nevada state law has long provided eminent domain rights to mining.³¹

31. Laws of Nevada, Seventh Session, Chapter LVII, "An Act to encourage the mining, milling, smelting, or other reduction of ores in the state of Nevada," approved March 1, 1875.



Refusal by the Courts below to rehear the facts in U.S. v. Sullivan will result in property loss to Petitioner, will serve no constructive function of the Interior Department, and will adversely affect the mineral industry at large. Therefore, Petitioner's rights to due process have been violated and evidentiary questions otherwise left to agency discretion must be decided in a factual hearing by the Courts.³²

32. U.S. vs. Noguiera, 403 F.2d 816 (9th Cir. 1968).

Conclusion

For these reasons, a writ of
certiorari should issue to review the
judgement and opinion of the Ninth
circuit.

Respectfully submitted,

Hale C. Tognoni

Hale C. Tognoni
100 West Clarendon, Suite 1260
Phoenix, AZ 85013
Counsel for Petitioner

APPENDIX

APPENDIX

TABLE OF CONTENTS

- i) ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.....1

ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.....2

- ii) DECISIONS, OPINIONS AND MEMORANDUMS RENDERED BY COURTS OR ADMINISTRATIVE AGENCIES IN THE CASE

Decision of the Hearing Examiner in United States v. Frank R. Sullivan, Nevada No. 065733.....3

Decision of the Hearing United States Department of Interior Board of Land Appeal, United States v. Sullivan, I.B.L.A. 72-273, 9 I.B.L.A. 278.....26

December 30, 1982, Decision and Order of District Judge Edward C. Reed in Robert L. Mendenhall v. United States, 1982 CV-R-80-146-ECR, Nevada, (Reno).....32

Decisions in Companion Cases

Charlestone Stone Products Co., Inc. v. Cecil D. Andrus, No. 75-1532, Ninth Circuit Court of Appeals, May 12, 1977.....59

Everett Foster v. Fred A. Seaton, Secretary of the Interior, No. 14953, District of Columbia Court of Appeals, October 22, 1959.....92

(iii) JUDGEMENT SOUGHT TO BE REVISED AND
ORDER ON REHEARING.....101

(iv) OTHER

Exhibit 4 - United States District
Court, Nevada Civil No. R-80-146-
ECR, Affidavit of George A.
Kiersch, Geologist and Engineer...107

Exhibit 10 - United States
District Court, Nevada Civil No.
R-80-146-ECR, Affidavit of
Robert L. Mendenhall, Petitioner..119



Supreme Court of the United States

No. A-194

ROBERT L. MENDENHALL,

Petitioner,

v.

UNITED STATES

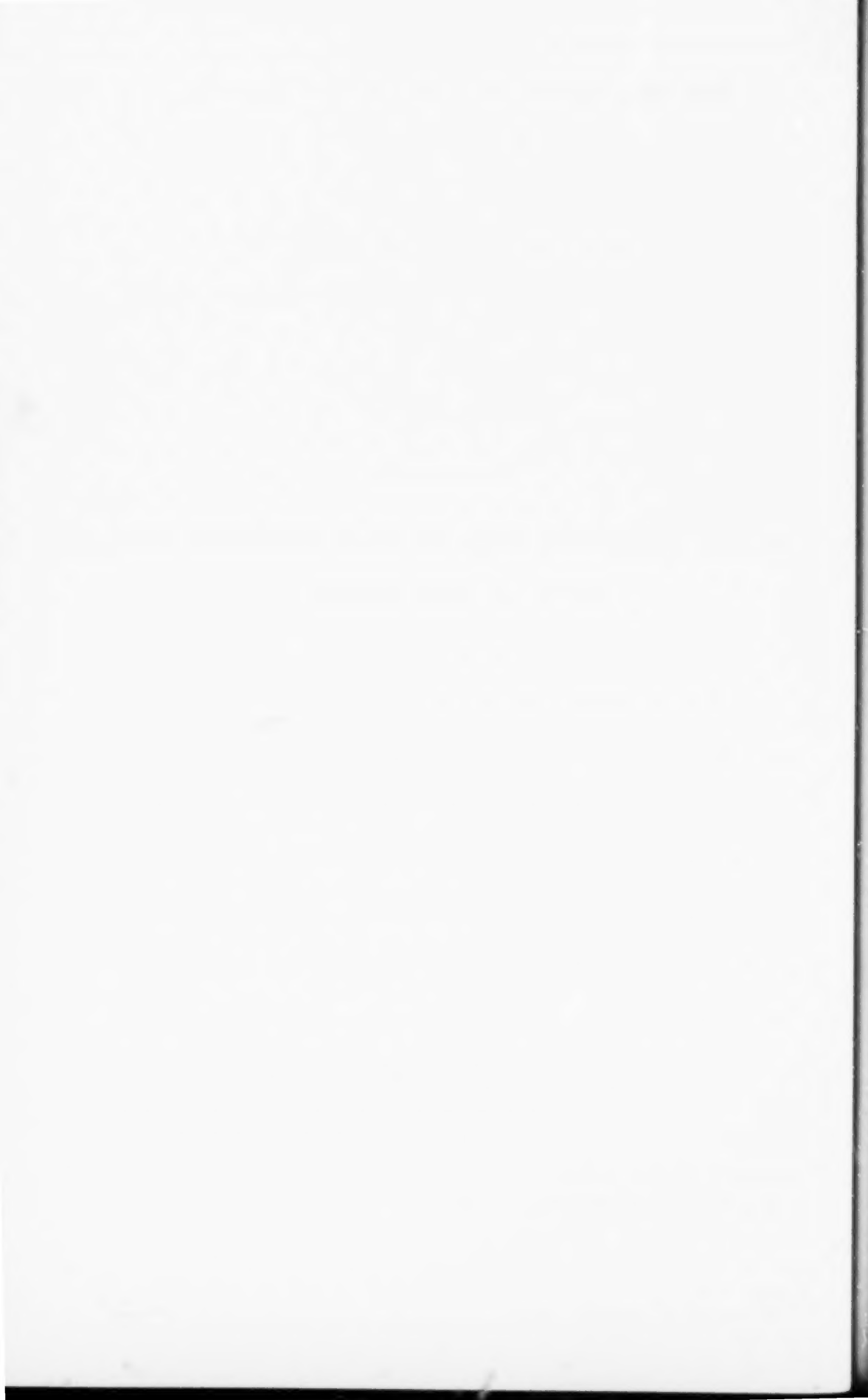
**ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI**

Upon Consideration fo the application
of counsel for petitioner(s),

It Is Ordered that the time for filing
a petition for writ of certiorari in the
above-entitled cause be, and the same is
hereby, extended to and including October
26, 1984.

/s/ William H. Rehnquist
Associate Justice of the Supreme
Court of the United States

Dated this 18th
day of September, 1984



Supreme Court of the United States

No. A-194

ROBERT L. MENDENHALL,

Petitioner,

v.

UNITED STATES

ORDER FURTHER EXTENDING TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

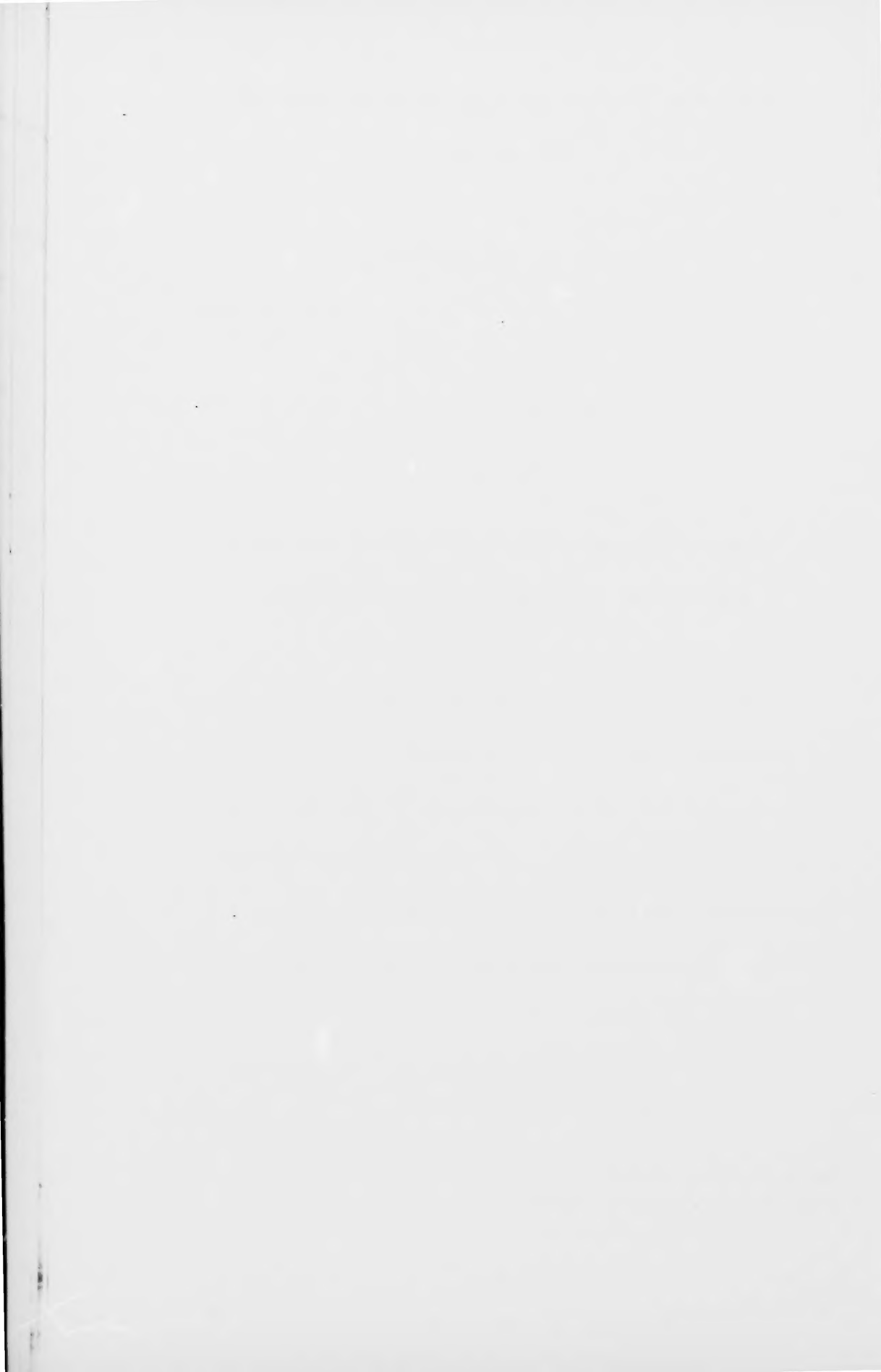
Upon Consideration fo the application
of counsel for petitioner(s),

It Is Ordered that the time for filing
a petition for writ of certiorari in the
above-entitled cause be, and the same is
hereby, extended further to and including
November 5, 1984.

/s/ William H. Rehnquist

Associate Justice of the Supreme
Court of the United States

Dated this 23th
day of October, 1984



UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

HEARINGS DIVISION

Room W-2426, 2800 Cottage Way
Sacramento, California 95825

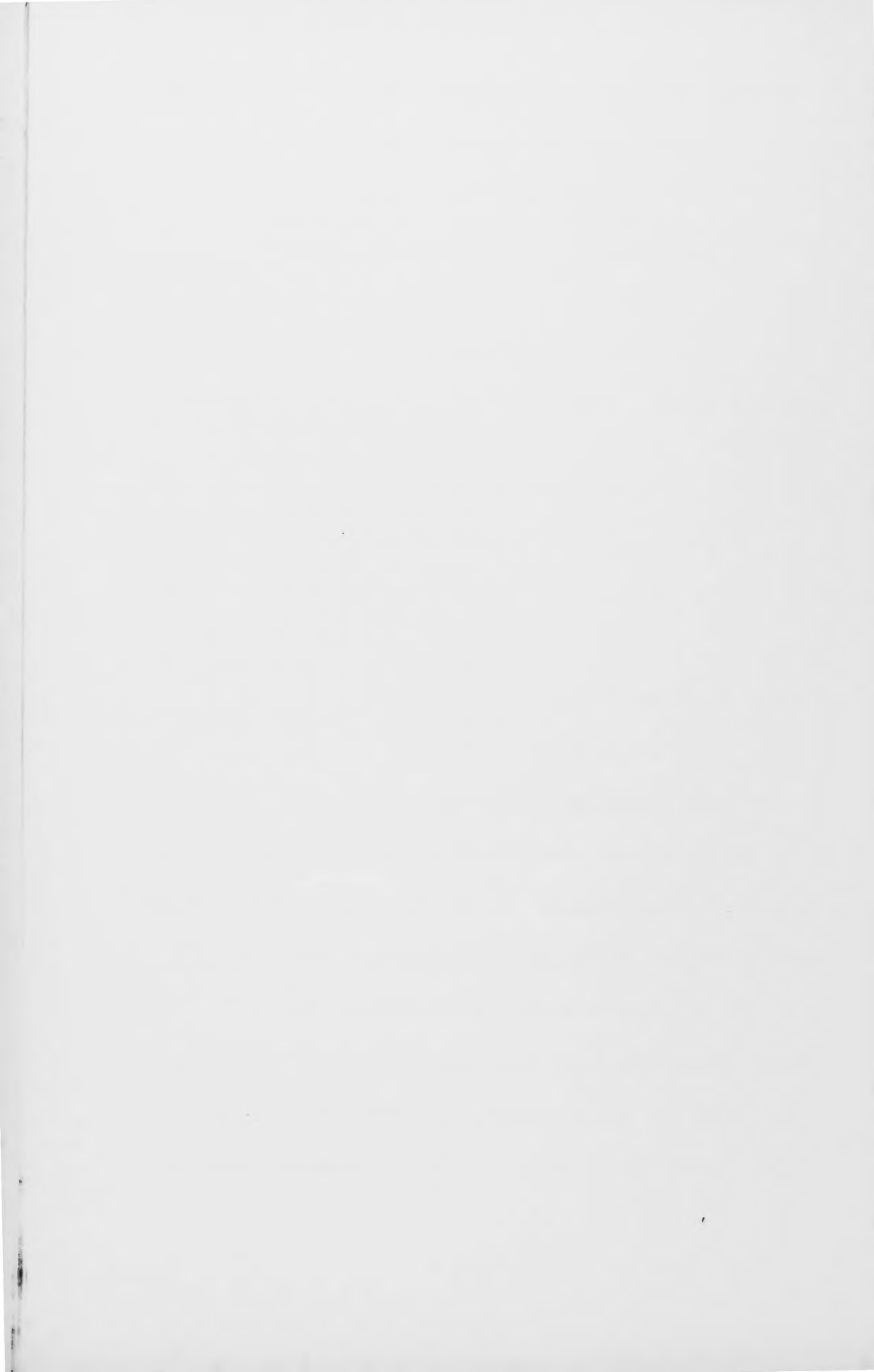
December 28, 1971

DECISION

| | | |
|---------------------------|---|--------------------------|
| United States of America, | : | Contest No. N-065732, |
| | : | <u>065733, Involving</u> |
| | : | Charleston No. 24 aka |
| Contestant | : | Charleston No. 39 and |
| | : | Extension 39 of the |
| | : | Charleston; and Char- |
| | : | leston Spur No. 1 |
| v. | : | placer mining claims, |
| | : | located in Secs. 34, |
| | : | 35, and 36, T. 19 S., |
| | : | R. 59 E., and Sec. 3, |
| Frank R. Sullivan, | : | T. 20 S., R. 59 E., |
| | : | M.D.M., Clark County, |
| Contestee | : | Nevada |

MINING CLAIMS DECLARED NULL AND VOID

The manager of the Nevada Land Office initiated these contests by filing a complaint which asserts as to Charleston No. 24 placer mining claim (also known as Charleston No. 39 and referred to in this decision as Charleston 24/39), and the Charleston Spur No. 1 placer mining claim:



1. That valuable minerals have not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws.
2. That no discovery of a valuable mineral has been made within the limits of the claims because the mineral materials present cannot be marketed at a profit and/or could not be marketed at a profit prior to the Act of July 23, 1955.

The contestee's answer denies the allegations of the complaint relating to lack of discovery of valuable minerals, and contends that "valuable minerals (namely; sand, gravel and/or rock) have been found within the limits of the claims and have been marketed at a profit both prior and subsequent to the Act of July 23, 1955."

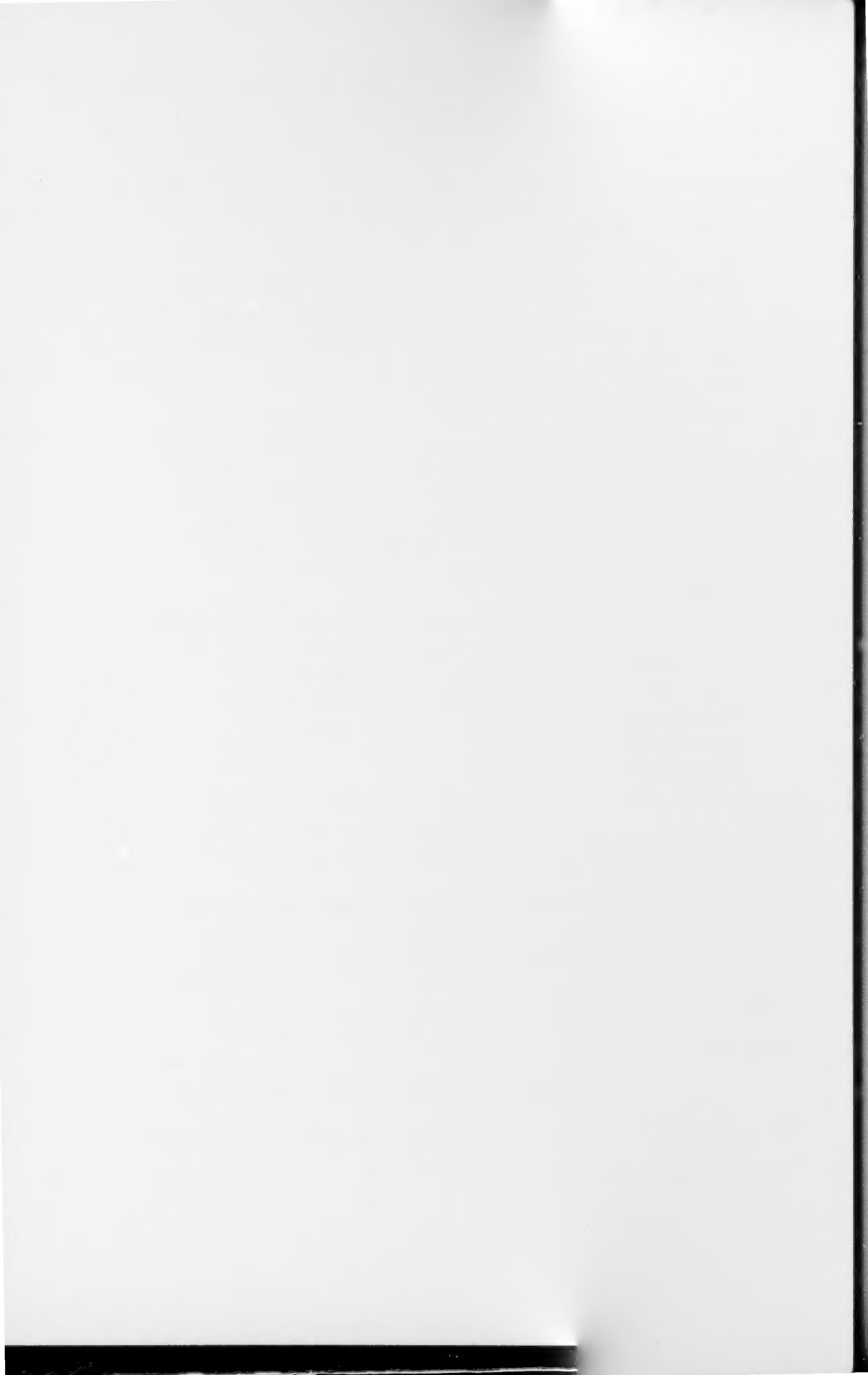
A hearing in this proceeding was held in Las Vegas, Nevada on February 18, 1971. In a brief filed subsequent to the hearing the contestee advised that he concurs with the following paragraphs of the "Summary of the Evidence," included in the post-hearing

brief filed on behalf of the Bureau of Land Management:

1. The only mineral material on the two contested claims is the sand and gravel.
2. The usable sand and gravel material on the two contested claims is suitable for all general construction purposes.
3. Subject to the usual minor differences, the sand and gravel material on the two contested claims is similar to and is useable for the same general construction and building purposes as other sand and gravel deposits in the Las Vegas area.
4. The sand and gravel materials on the two contested claims constitute "common varieties of sand and gravel" within the purview of Section 3 of the Act of July 23, 1955.
5. The entire area of the Charleston No. 24/39 claim contains good quality commercial sand and gravel.

The five statements listed above are also supported by the evidence in the case record.

Mr. Thomas E. Schessler, a mining engineer, testified at the hearing on behalf of the



Bureau of Land Management. The only other witness was the contestee, Mr. Frank R. Sullivan.

Review of Evidence; Findings

Mr. Schessler has a degree in geology and at the time of the hearing had worked for the U.S. Geological Survey, private mining companies, the U.S. Forest Service, and the Bureau of Land Management for a total of approximately 19 years. Tr. 2-3. In his work as a mining engineer he had examined "around a hundred" sand and gravel claims or deposits located in nine states other than Nevada, and between twenty and thirty claims in the Las Vegas Valley. In his research on the claims in question he learned that they had been located in late February 1955 by Mr. E. H. Brawner. The contestee acquired them in 1958 or 1959 as a part of a group of more than 20 "Charleston" claims.



The two contested claims are approximately eleven miles by air or twelve miles by road northwest of Las Vegas. Tr. 10.

Mr. Schessler examined them on January 22, 1971 and February 11, 1971. Tr. 9.

Because he did not come to the Las Vegas area to work until 1967 his knowledge of the history of the claims, and activity on them during previous years was gained from a review of documents, including Bureau files, aerial photographs, and records of market sales of sand and gravel.

In 1971 Mr. Schessler found two bulldozer cuts on the east end of Charleston 24/39, with piles of sand and gravel material nearby. His impression was that none of the excavated material had been removed from the claim. In addition, there are four or five older bulldozer cuts on the western end of that claim. Tr. 11-12. The excavated material in that area "seemed all to have been in place." Tr. 12.



No pits or improvements were found on Charleston Spur No. 1. Exh. 2; Tr. 12. Most of that claim is bedrock outcrop. However, there is "probably not more than three acres" of alluvial type sand and gravel in a draw which crosses the lower part of the claim, and extends for a short distance into the upper portion. Exh. 3; Tr. 13.

From his investigation and observations, Mr. Schessler concluded that there had been no removal or marketing of materials from either of the claims. Tr. 15. He indicated, however, that it would be hard to determine whether or not there had been removal of material from a draw in the western end of Charleston 24/29. Tr. 17-18. In recent years Mr. Sullivan has constructed a road which provides access to Charleston 24/39 from the east. Tr. 17. Until that was done only the western end of



Charleston 24/39 and the southeastern portion of Charleston Spur No. 1 could be reached by road. He pointed out that a 1965 aerial photograph (Exhibit 3) shows no road coming into Charleston 24/39 from the east, and no bulldozer cuts on the eastern end.

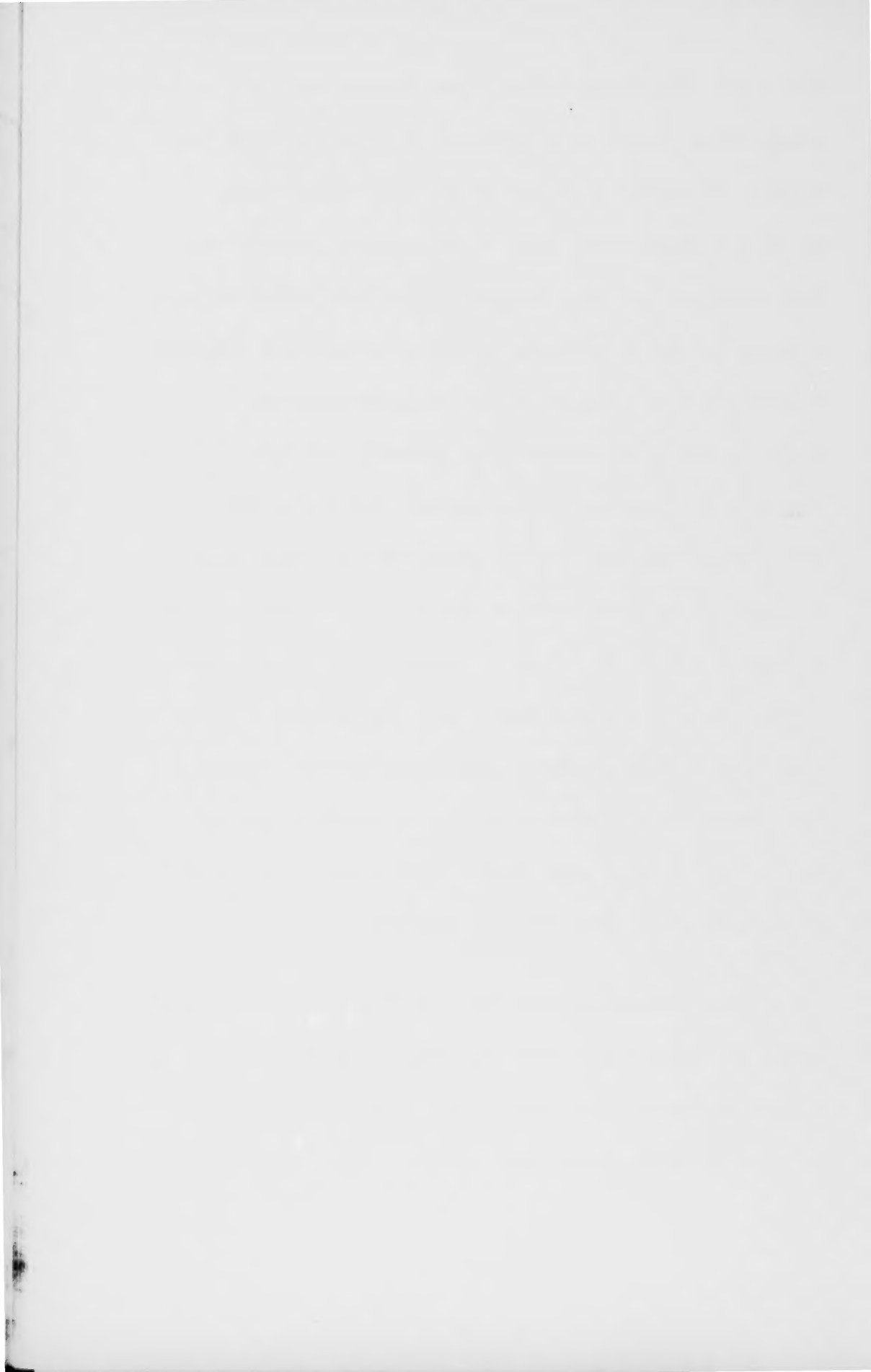
The Bureau's expert was unable to estimate the depth of the sand and gravel contained in the three acre portion of Charleston Spur No. 1. He found "essentially no sand and gravel" on the upper portion of that claim. He observed the sand and gravel deposit on Charleston 24/39 to a depth of 20 feet, and conceded that it could extend to a depth of 500 or 600 feet - - that claim could easily contain a million cubic yards. Tr. 18, 24, 49.

Mr. Schessler testified that any marketing of sand and gravel from the claims "could not have been in large quantities."



Tr. 19. He described the locations of competing sand and gravel firms in the Las Vegas Valley, and pointed out that they were between two and five miles closer to the center of Las Vegas than the Charleston claims. In his view this placed the latter claims at a competitive disadvantage. Taking into account the growth of Las Vegas, he stated that prior to July 23, 1955 the "competitive problem of haulage distance was probably more. . . than it is today." Tr. 21. As a result of his investigation he concluded that material from the two claims under consideration could not have been marketed at a profit as of July 23, 1955, and that there was no market demonstrated for those claims.

On cross examination Mr. Schessler conceded that at the time of the hearing there was a total market for sand and gravel in excess of 3,000,000 tons per year. He



acknowledged that in his 1971 inspections he found signs of removal from the 11 and 13A components of Charleston 24/39 (depicted on Exhibit 2), observing that the "evidence is slim that it was in any large quantity." Tr. 27. He insisted that there is nothing on the 1965 aerial photograph (Exhibit 3) to indicate "any substantial removal." Tr. 29, 31. He agreed that very heavy rainfall and a resulting flood could have obliterated excavations in the draws. Tr. 32.

The contestee in his testimony explained that he acquired all of the Charleston claims "on a foreclosure." Tr. 38. He transferred the Charleston 1 through Charleston 22 claims to Charleston Stone Products, but retained his interest in Charleston 24/39 and Charleston Spur No. 1. His statements relating to removal of sand and gravel were couched in very



general terms. Excavated pits from which materials were removed and which are observable on Exhibit 3 are located outside of the boundaries of the two claims involved in this contest (they may encroach to a minor extent on Charleston 24/39).

Tr. 41. Mr. Sullivan stated that he "sold an awful lot of gravel" from a wash in the western (11 and 13A) segments of Charleston 24/39. This was in 1957 or later. Tr. 36-38. He described the removals as follows:

"At that time I didn't have big equipment. I did have small loaders, so I had to take what was loose and available, and close to the road. The road went right by it, and every time a flood would come down. . . it would come right back in and fill it and I would go right back and dig it up." Tr. 43.

Two of the sand and gravel stockpiles which are "off the western boundary of Charleston 24/39 claim" were placed by Mr. Sullivan when he owned all of the Charleston claims. Tr. 44.

At the hearing the contestee produced no evidence to establish that sand and gravel had been removed and marketed from Charleston 24/39 and Charleston Spur No. 1 prior to July 23, 1955. Four unsworn statements are attached to the Contestee's Brief, filed on July 9, 1971. One states that Wheeler Freightways "hailed gravel for Mr. E. J. Braner (sic) prior to 1955 on several occasions to areas in the Valley and different business concerns." The second unsworn statement is from a construction company superintendent, and concerns a purchase of rock and gravel "in 1957-8."

The other two unsworn statements share the basic deficiency of the two which have been described, being mere attachments to a brief filed after the hearing. However, they are the only ones which both (i) mention a time prior to July 23, 1955, and

(ii) refer to material hauled from the two claims which are the subject of this contest. One, from an employee or former employee of the North Las Vegas Street Department, advises that the signer of the statement "in 1954, 1955, 1956. . . did haul gravel from pits located in the Charleston Placer No. 24 and the Charleston Spur Placer Mining Claim. . . ." No details as to amounts paid for the gravel, if any, or as to quantities are provided. Also the statement does not furnish specific information on what happened during the five months which elapsed between the location of the claims and July 23, 1955.

The last statement, from Mrs. Hilda Pine, refers to her husband as the "original discoverer," and asserts that "gravel was sold as a business venture from Mining Claim known as Charleston Spur No. 1, and Charleston No. 24, and Charleston



No. 39." Mrs. Pine's statement discusses receipt of "monies in payment for the gravel which was sold from our mining claims," her inspection of "claims to see that things were as they were ordered by my husband," and receipt of monies each year for gravel payments [d]uring the years that Mr. Brawner was staying with me and Mr. Pine, prior to 1955" (emphasis supplied). Mr. Pine was one of the locators of the Charleston Nos. 1 through 22 placer claims (see p. 2 of Hearing Examiner's October 30, 1970, decision in Contest Nos. N-065729-A-Q and N-065731-A-B in which Charleston Stone Products, Inc., is the contestee), but exhibits 4, 4A, 5 and 5A in this (the Sullivan) contest show that he was not a locator of Charleston 24/39 or Charleston Spur No. 1. This fact, plus Mrs. Pine's reference to receipt of monies prior to 1955, indicate that she is confused as to claim boundaries and names.



Considered in its entirety, her statement is far more consistent with removals from one or more of the claims which had been located in 1942 by Mrs. Pine's husband and A.M. Murphy (Charleston Nos. 1-22) than it is with the asserted sales from Charleston Spur No. 1 and Charleston 24/39. It is noted that the Hearing Examiner's decision which is cited in this paragraph found that "Mr. Brawner was operating from Claim 10 and was utilizing material from Claim 9 in 1955 at the rate of approximately 5000 yards a year," and that within Claim 9 and Claim 10 "there is in excess of 1,000,000 yards of usable material."

Charleston Stone Products, Inc., contends that it is the owner of the 11 and 13A portions of Mr. Sullivan's Charleston 24/39 claims (see Exhibit 2). Therefore, the testimony of a "number of witnesses" in the Charleston Stone Products (the subject of

the above-titled Hearing Examiner's decision), describing "the Brawner operation on the claims between 1954 and 1958" is of some interest. The findings in that decision would seem to be at least as reliable as the allegations in the unsworn statements attached to the contestee's brief.

The Hearing Examiner found:

"There was no active operation on any of the remaining claims on July 23, 1955, [the reference is to all claims involved other than Charleston Nos. 9 and 10, and includes the overlapping 11 and 13A portions of Charleston 24/39] and the occasional utilization of material from these claims prior to and after that date was not connected with the Brawner operation. Also there was no probative evidence that the deposit on any of these latter claims could have been operated profitably in competition with the many other potential deposits in the Las Vegas Valley on the critical date"

Conclusions and Decision

Upon the establishment of a prima facie case by the Government, the burden shifts to the mining claimant to show by a

preponderance of evidence that a discovery of valuable minerals has been made. United States v. Patee et al. A-28731 (May 7, 1962).

A recent decision, United States v. Clear Gravel Enterprises, Inc. IBLA 70-15 (May 2, 1971), summarizes the legal principles which govern this proceeding as follows:

"The basic principles of law. . . are now well established and need no extensive elaboration. For a mining claim to be valid there must be discovered on the claim a valuable mineral deposit. A discovery exists

[W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine. . . . Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968).

"This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed and

presently marketed at a profit, the so-called marketability test.

United States v. Coleman, supra.

This present marketability can be demonstrated by a favorable showing as to such facts as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand. The marketability test has been specifically held to be applicable in determining the validity of sand and gravel claims in the Las Vegas area. Palmer v. Dredge Corporation [398 F. 2d 791 (9th Cir. 1968), cert. den., 393 U.S. 1066 (1969)]; Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1969); Osborne v. Hammit, Civil No. 414 (D. Nev., August 19, 1964).

"Furthermore, since Congress withdrew common varieties of sand and gravel from location under the mining laws on July 23, 1955 (30 U.S.C. §611 (1964)), it is incumbent upon one who located a claim prior to that date for a common variety of sand and gravel to show that all the requirements for a discovery, including a showing that materials could have been extracted, removed and marketed at a profit, had been met by that date. Palmer v. Dredge Corporation [cited above]; United States v. Barrows, 404 F.2d 749 (9th Cir. 1958), cert. den., 394 U.S. 974 (1969).

The Clear Gravel Enterprises decision also holds that to satisfy the marketability



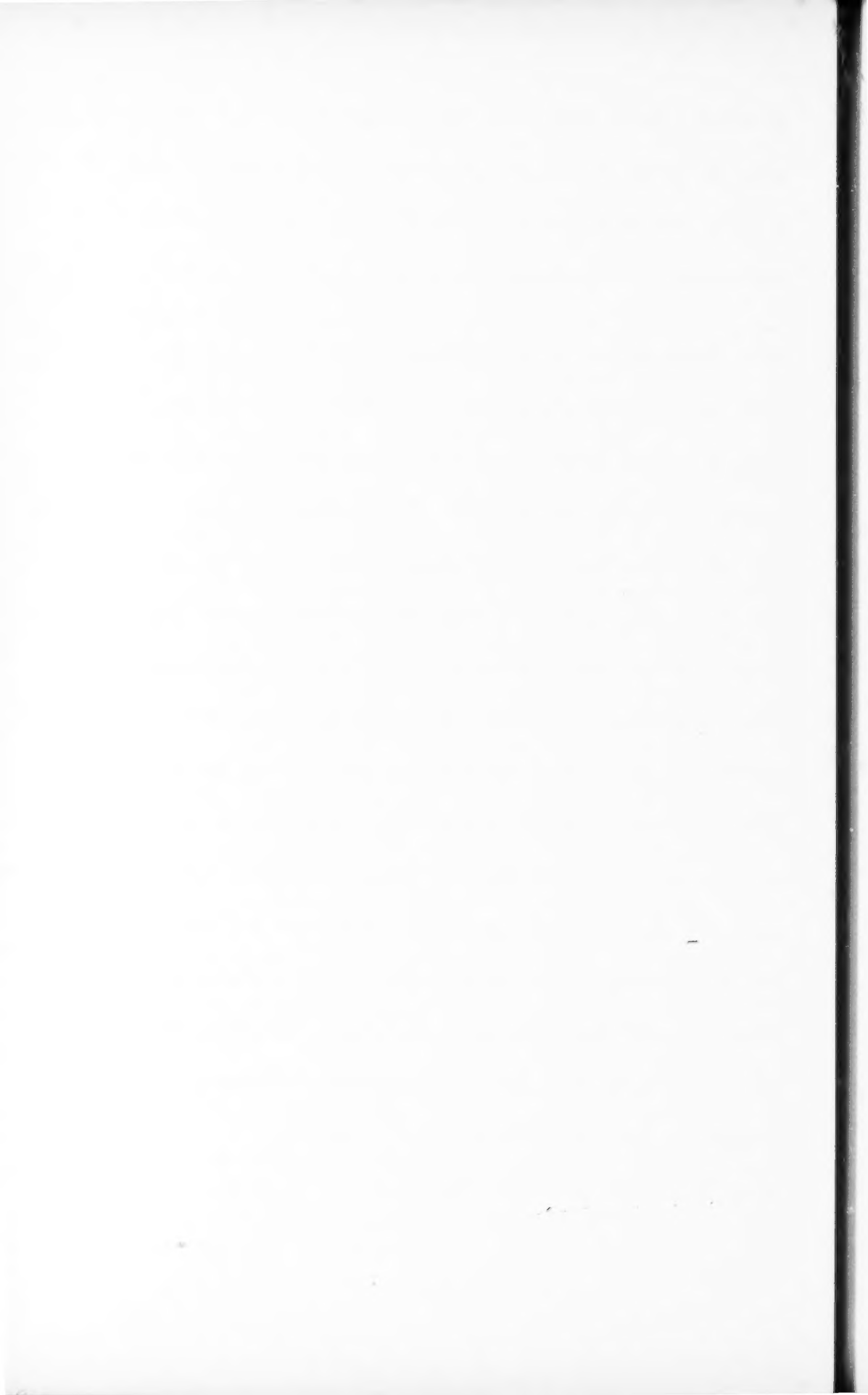
test for minerals of widespread occurrence, it is not enough to show that there is a general demand for the type of material in question -- it must be shown that the mineral from the particular deposit could have been extracted, sold and marketed at a profit. The decision also quotes extensively from Osborne v. Hammit, supra. A portion of the quoted material from the latter decision is as follows:

"the record discloses a situation where, if the Bradford Claims could be sustained on the hypothetical and speculative opinion evidence relied upon by the plaintiffs, each of the claims in the valley comprising over 100,000 acres might be separately validated on the same sort of theoretical evidence. The end result would be that 100,000 acres of public land would have been patented as valuable for mining, where it is evident and shown by the record that not more than one percent of the material might have been marketable in the reasonably foreseeable future."

The Court observed also that the plaintiffs had "failed to enter the race" to supply the theoretical insufficiency of sand and

gravel, and that if they had done so they would have demonstrated present demand and given an indication that they intended to develop the claims in good faith.

Mr. Schessler's testimony and Exhibit 3, the aerial photograph, establish a prima facie case that there was no production or sale of sand or gravel from Charleston 24/39 and Charleston Spur No. 1 on or prior to July 23, 1955. The excavated pits on Charleston Nos. 9 and 10 are corroborative of the Hearing Examiner's finding (in the October 30, 1970 decision relating to the Charleston claims which Mr. Sullivan did not retain) that Mr. Brawner's sand and gravel operation and utilization of materials during 1955 and prior years involved Charleston Nos. 9 and 10, not the two which are the subject of this contest (located by Brawner in late February, 1955). Mr. Brawner had 27 Charleston claims

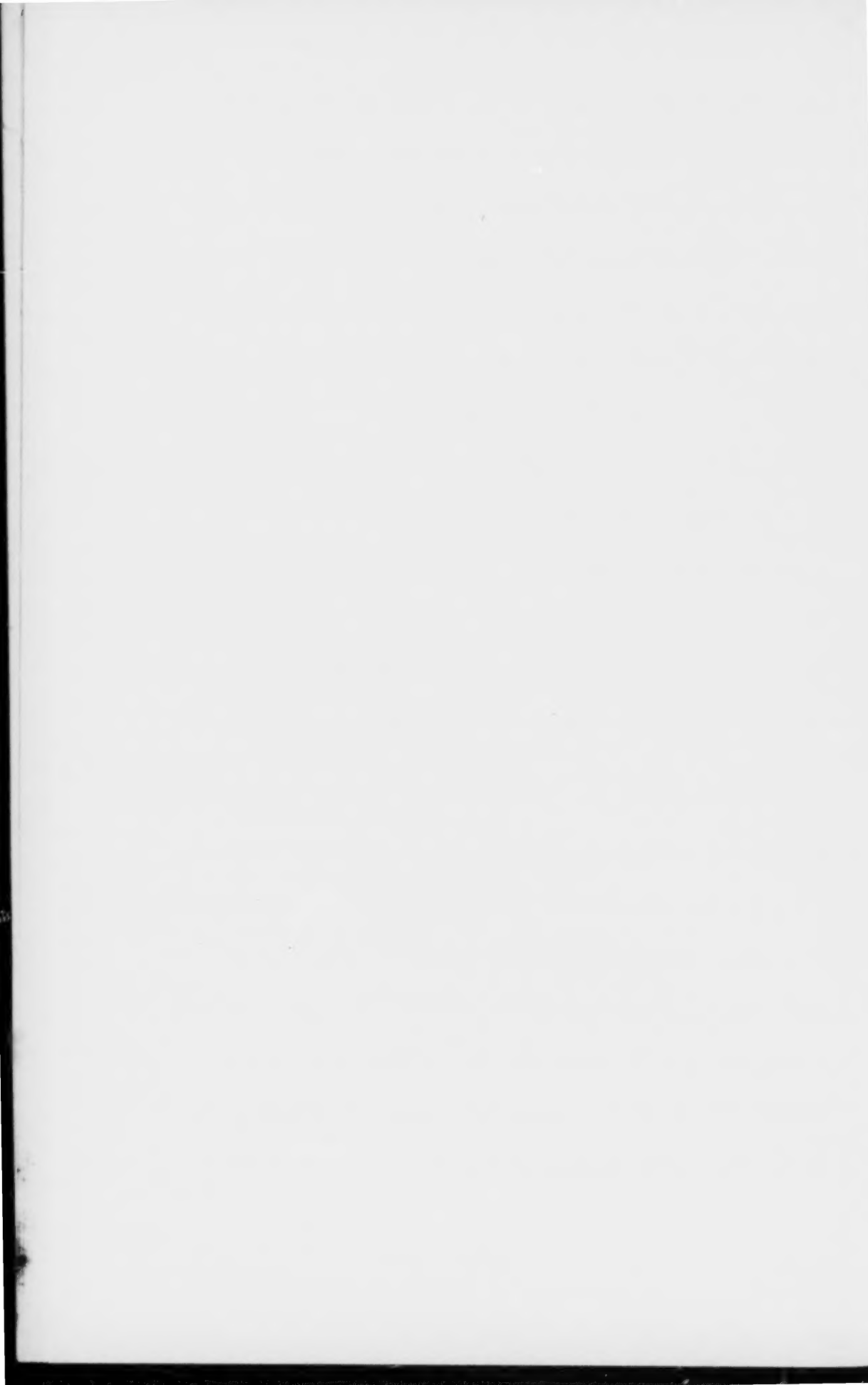


available at that time, but was disposing of relatively minor quantities of sand and gravel. The case record provides no support for an assumption that he moved from the Charleston Nos. 9 and 10 claims to either Charleston 24/39 or Charleston Spur 24/39 at any time during, or prior to, 1955.

The contestee's brief asserts that in the event marketing from the contested claims did not occur prior to July 23, 1955, the criteria is "could have been marketed" at a profit prior to that date. Then, noting the contestee's testimony that he marketed materials from the two claims at a profit in years subsequent to 1955, the brief argues that this is an indication "that the materials were within the province of the definition of marketable material." But this leads one directly to an inquiry as to why sand and gravel from Charleston 24/39

and Charleston Spur No. 1 would have been utilized to satisfy a limited demand in preference to sand and gravel from the other Charleston claims. The demand was limited due to the existence of established sand and gravel operations which were closer to the City of Las Vegas. The few thousand yards of material sold annually by Mr. Brawner in those years satisfied the demand, and cannot be spread around to validate all of the Charleston claims. This contest provides an example of a failure "to enter the race" as mentioned in Osborne v. Hammit, supra.

A mining claimant does not meet his burden of proof, once the Government has presented a prima facie case, by presenting only infirm or inconsistent recollection rather than adequate records or other reliable means of proof. Accord, United States v. E.A. Barrows and Esther Barrows, A-31023



(November 28, 1969). The contestee has failed to show by the preponderance of the evidence (i) that any quantity of sand and gravel actually was marketed from the contested claims prior to July 23, 1955, or (ii) that under known marketing conditions, there was an outlet for profitable disposal of a substantial quantity of sand and gravel from the two contested claims prior to July 23, 1955. Therefore, the Bureau has sustained the charge that no discovery of a valuable mineral has been made within the limits of the claims because the mineral materials present could not be marketed at a profit prior to the Act of July 23, 1955. In view of this holding there appears to be no necessity for rulings on the other charges contained in the complaint. The Charleston 24/39 and Charleston Spur No. 1 placer mining claims are hereby declared null and void.

An appeal from this decision may be taken to the Board of Land Appeal, in accordance with the regulations of 43 CFR Part 4, published in 36 F.R. 7185-7208, April 15, 1971 (Subpart E contains special rules applicable to public land appeals). If an appeal is taken the notice of appeal must be filed in this office (not with the Board) in order to facilitate transmittal of the case file to the Board. If the procedures set forth in the regulations are not followed, an appeal is subject to dismissal.

Dean F. Ratzman
Hearing Examiner

Distribution:

Otto Aho, Field Solicitor, U.S. Department of the Interior, Room 2004, Federal Building, 300 Booth Street, Reno, Nevada 89502 (Cert.)

Robert J. McNutt, Agent for Contestee, 5636 West Charleston Boulevard, Las Vegas, Nevada 89101 (Cert.)

Frank Sullivan
Box 3186 Las Vegas, Nevada 89114 (Cert.)

Standard Distribution

Enclosure: Regulations relating to appeals procedures

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

INTERIOR BOARD OF LAND APPEALS

4015 Wilson Boulevard
Arlington, Virginia 22203

UNITED STATES

v.

FRANK R. SULLIVAN

IBLA 72-273

Decided February 6, 1973

Appeal from a decision by Administrative Law Judge Dean F. Ratzman declaring mining claims null and void. (Contest Nos. N-065732 and N-065733.

Affirmed.

Administrative Procedure: Hearings--Constitutional Law

In an administrative proceeding to determine the validity of a mining claim, there is no denial of due process for lack of representation by a member of the bar. Due process

1. The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).



in such cases envisages notice and an opportunity for a hearing.

APPEARANCES: Keith C. Hayes, Esq., of Las Vegas, Nevada, for the appellant; Otto Aho, Esq., Field Solicitor, United States Department of the Interior, Reno, Nevada, for the appellee.

OPINION BY MR. FISHMAN

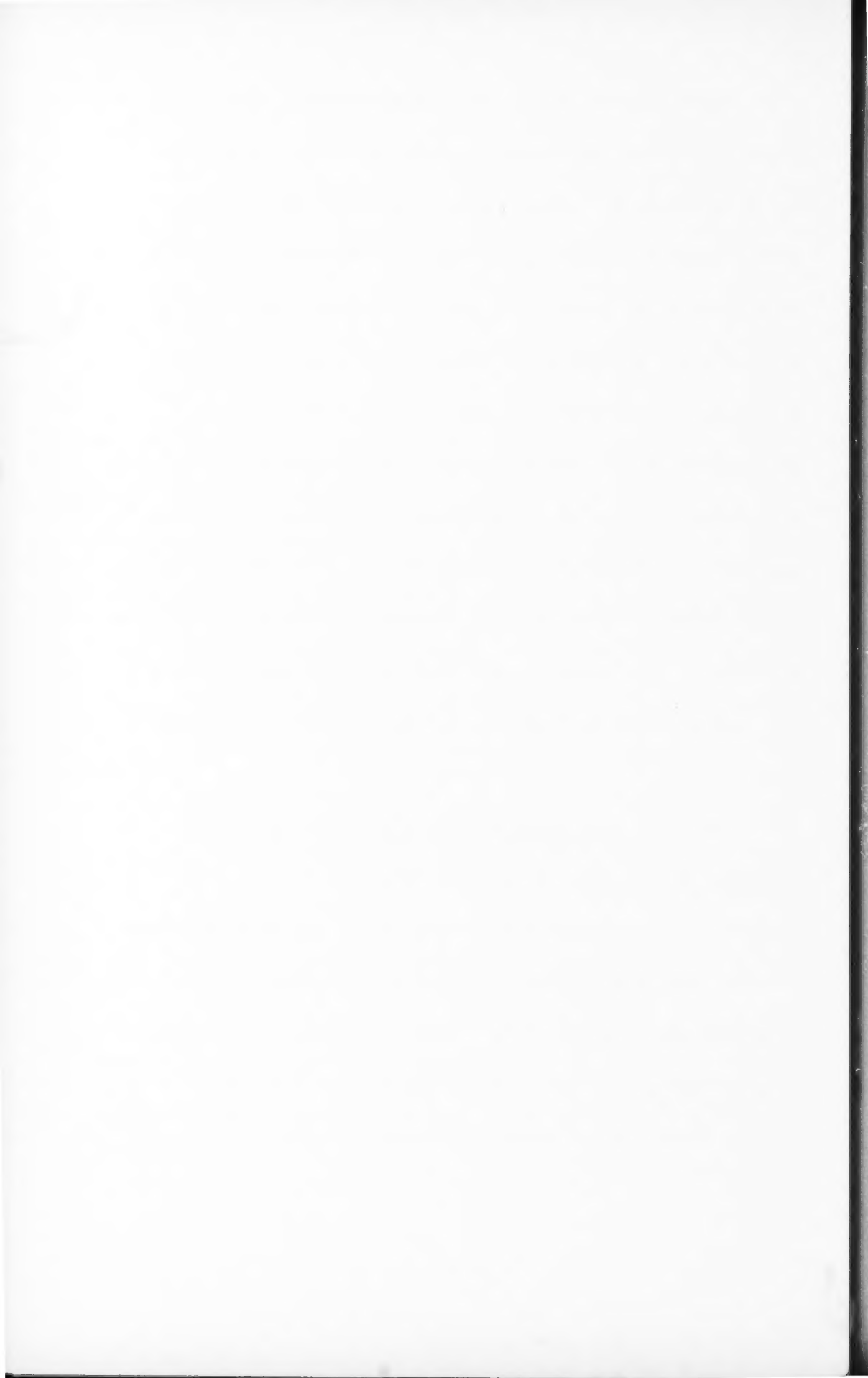
Frank R. Sullivan has appealed to the Board of Land Appeals from a decision by an Administrative Law Judge dated December 28, 1971, which declared appellant's mining claims to be null and void.

The mining claims in issue were the Charleston No. 24 (also known as the Charleston No. 39 and Extention 39 of the Charleston) and the Charleston Spur No. 1. The claims are situated approximately 12 miles from Las Vegas, Nevada and were located for sand and gravel in February of 1955.



Appellant does not challenge the findings of fact or conclusion of law reached by the Judge. Instead, counsel for appellant argues that principles of due process require the decision of December 28, 1971, to be set aside and appellant to be given another opportunity to present his case. In support of this position, counsel for appellant states that appellant was represented by Robert J. McNutt at the hearing, that McNutt was not a lawyer, and that neither the appellant nor McNutt was aware of appellant's burden or proof at the hearing.

In United States v. Charles D. and Jeanne D. Haas, A-30654 (February 16, 1967), the appellants therein, whose mining claim was declared invalid, similarly argued on appeal that due process required their case to be remanded for a new hearing. The Department stated:



The appellants contend that it was an "abuse" of due process to allow them to present their case without aid of legal counsel. They suggest generally that their case could have been presented at the hearing in a more effective manner had they had benefit of legal counsel. This may be true. However, there was nothing that prevented the appellants from being represented by proper legal counsel. Department regulations permit a party to be represented at a hearing by proper legal counsel (see 43 CFR Part 1 [now codified as 43 CFR 1.3] and 43 CFR 1850-0-6(3)(4)), but there is nothing to require such representation.

In an administrative proceeding to determine the validity of a mining claim, there is no denial of due



process for lack of representation by proper legal counsel. Due process in such case implies notice and a hearing. Orchard v. Alexander, 157 U.S. 372, 383 (1895); Cameron v. United States, 252 U.S. 450, 460 (1920); Best v. Humoboldt Placer Mining Co., 371 U.S. 334, 338 (1963). * * *

For similar results, see United States v. Raymond Bass, Betty Yeck, et. al., 6 IBLA 113, 117 (1972) and United States v. William A. McCall and R.J. Kaltenborn, 1 IBLA 115, 121, (1970).

In the case at bar, appellant was properly notified of the contest proceedings which were initiated to challenge the validity of his mining claims. Appellant was also afforded a fair hearing. It was he who chose not to engage the services of a lawyer at the time of the hearing when

his rights were at stake. He may not now be heard to complain.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman,
Member

We concur:

Newton Frishberg,
Chairman

Edward W. Stuebing,
Member

-31-

Mr. Schessler said that he had personally inspected the two claims on January 22, 1971, and February 11, 1971. A geologist from his office had accompanied him on the first inspection trip; Mr. Schessler had been alone during the second trip. He testified that he had driven onto the claims in a four-wheel drive vehicle. In particular, he had been looking for "improvements." He had found the two major bulldozer cuts. However, he reported that all of the materials that had been excavated seemed to be piled up near the cuts. Little or none appeared to have been removed.

The gravel deposits on the claims were described by Mr. Schessler as partly bank gravel, and the remainder as stream gravel. He said they were similar to other limestone-dolomite deposits in the Las Vegas Valley. The witness reiterated that neither his aerial photograph study nor his

-38-



UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROBERT L. MENDENHALL,

Plaintiff, CV-R-80-146-ECR

vs.

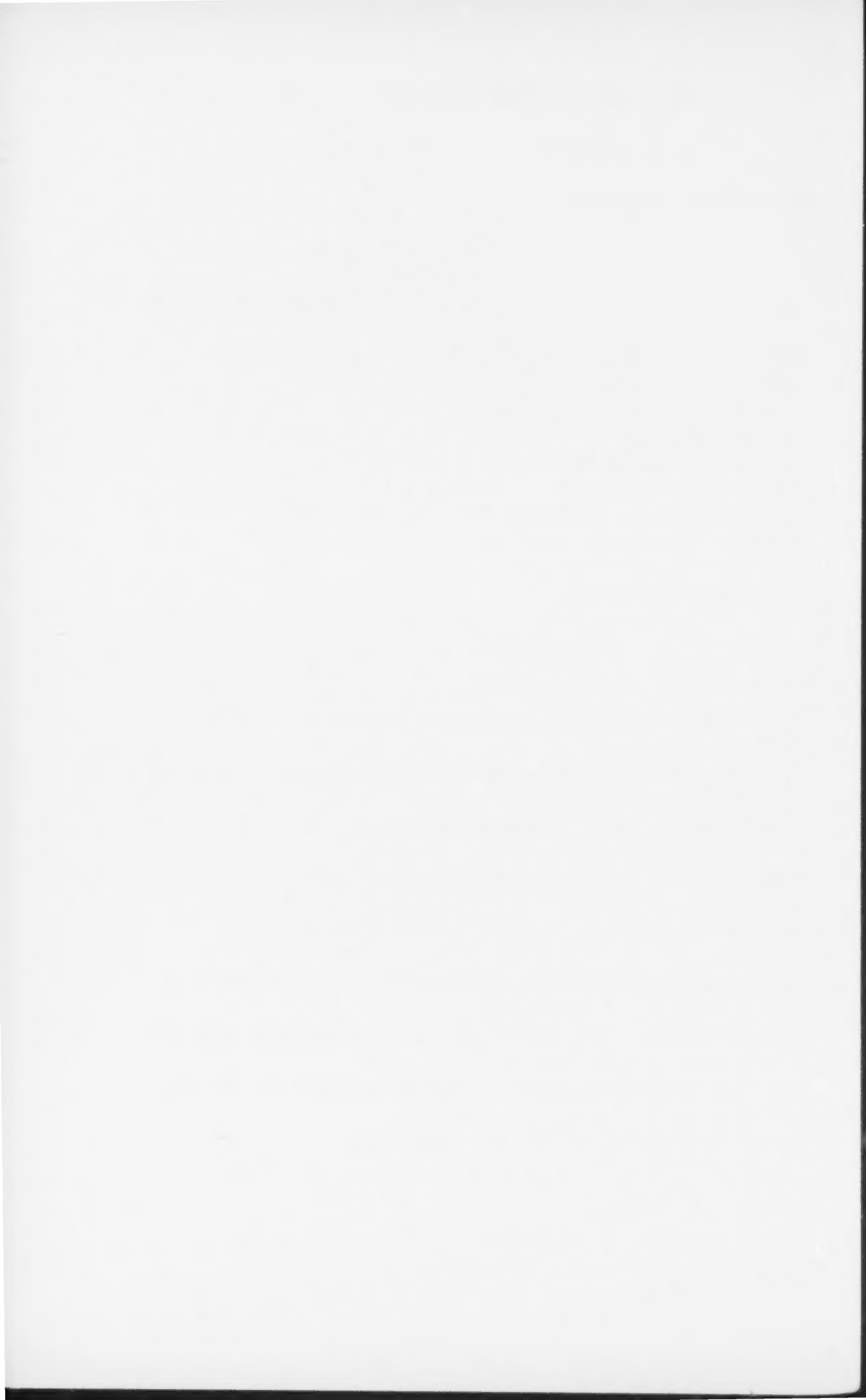
MEMORANDUM DECISION

THE UNITED STATES OF
AMERICA, THE UNITED
STATES DEPARTMENT OF
INTERIOR, an
CECIL D. ANDRUS,
Secretary of the
Interior and EDWARD F.
SPANG, State Director
of Nevada Bureau of
Land Management,

AND ORDER

Defendants.

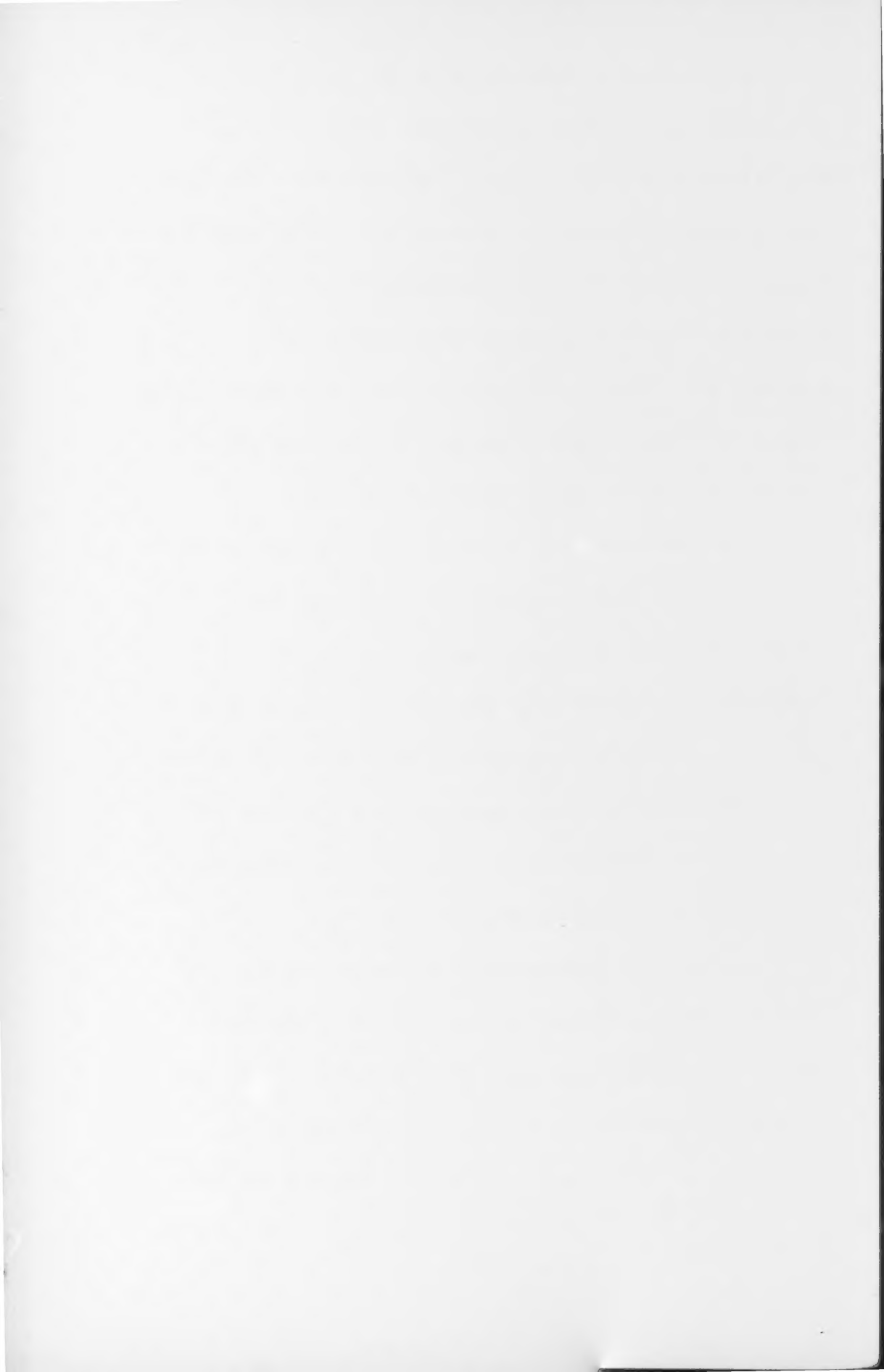
This matter has come before the Court by reason of the plaintiff's objections to the report and recommendation of U.S. Magistrate Phyllis H. Atkins, which was filed March 31, 1982. The report and recommendation was made after considering the plaintiff's motion to set aside agency action and the motion to dismiss of defendant United States of America.



This Court has made a de novo determination as to the portions of the Magistrate's report and recommendation that the plaintiff has objected to. The entire record before the Magistrate has been studied, oral argument was heard on August 9, 1982, and additional evidence and legal briefs submitted post-hearing by leave of Court have been examined.

In February of 1955, predecessors in interest of the plaintiff located two placer claims (often referred to as Charleston 24/39 and Charleston Spur No. 1) in Clark County, Nevada. Notices of location were duly recorded in the Office of the County Recorder. The claims covered deposits of sand and gravel.

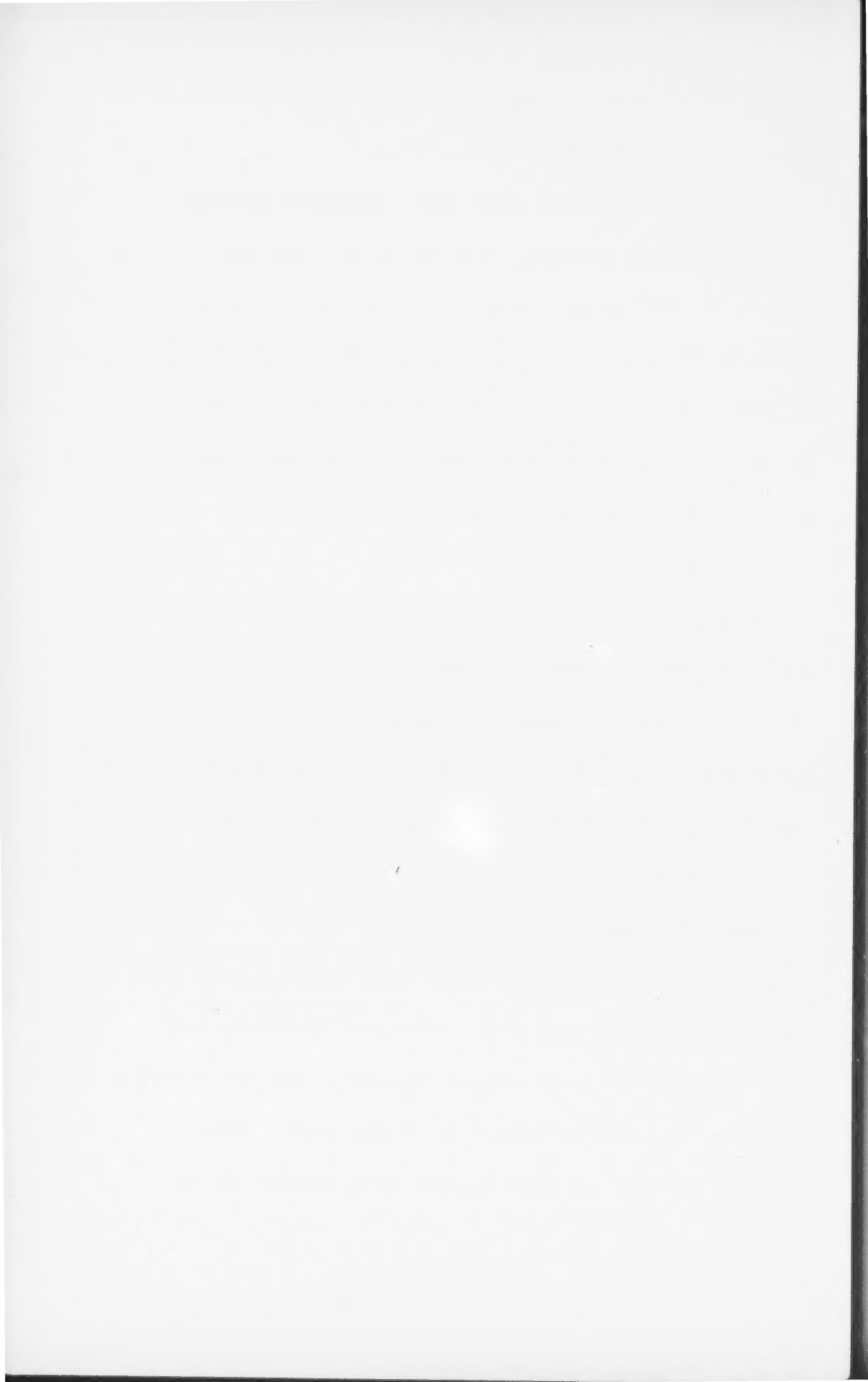
Congress subsequently enacted 30 U.S.C. §611, which declared that common varieties of sand and gravel would not be deemed valuable minerals after July 23, 1955, so that they could not serve as the



basis for any mining claim located subsequent to that date.

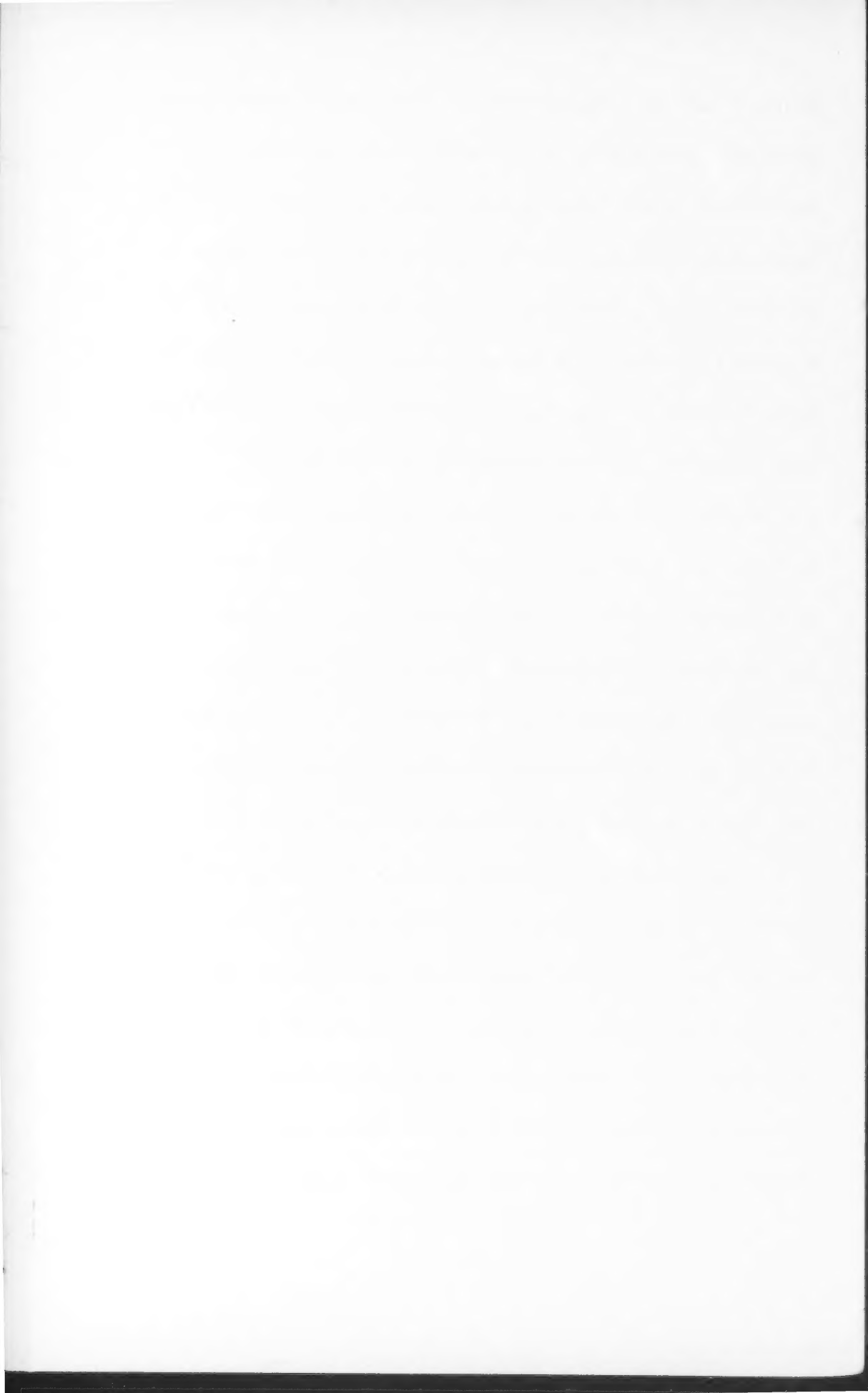
Possession of the two subject claims was obtained through foreclosure by Mr. Frank R. Sullivan, in 1959. The United States filed a complaint, in November 1965, contesting the validity of mining claims. Essentially, the Government contended that no valuable minerals were found within the claims because the sand and gravel had not been and could not be marketed profitably on or before July 23, 1955.

Acting pursuant to a power-of-attorney, civil engineer Robert J. McNutt answered the complaint for Mr. Sullivan. The Nevada land office of the U.S. Bureau of Land Management, Department of Interior, declared the claims null and void. One of the reasons given was that Mr. McNutt had not qualified, as a non-lawyer, to practice before the Department of Interior. Mr. McNutt filed an appeal of the decision on

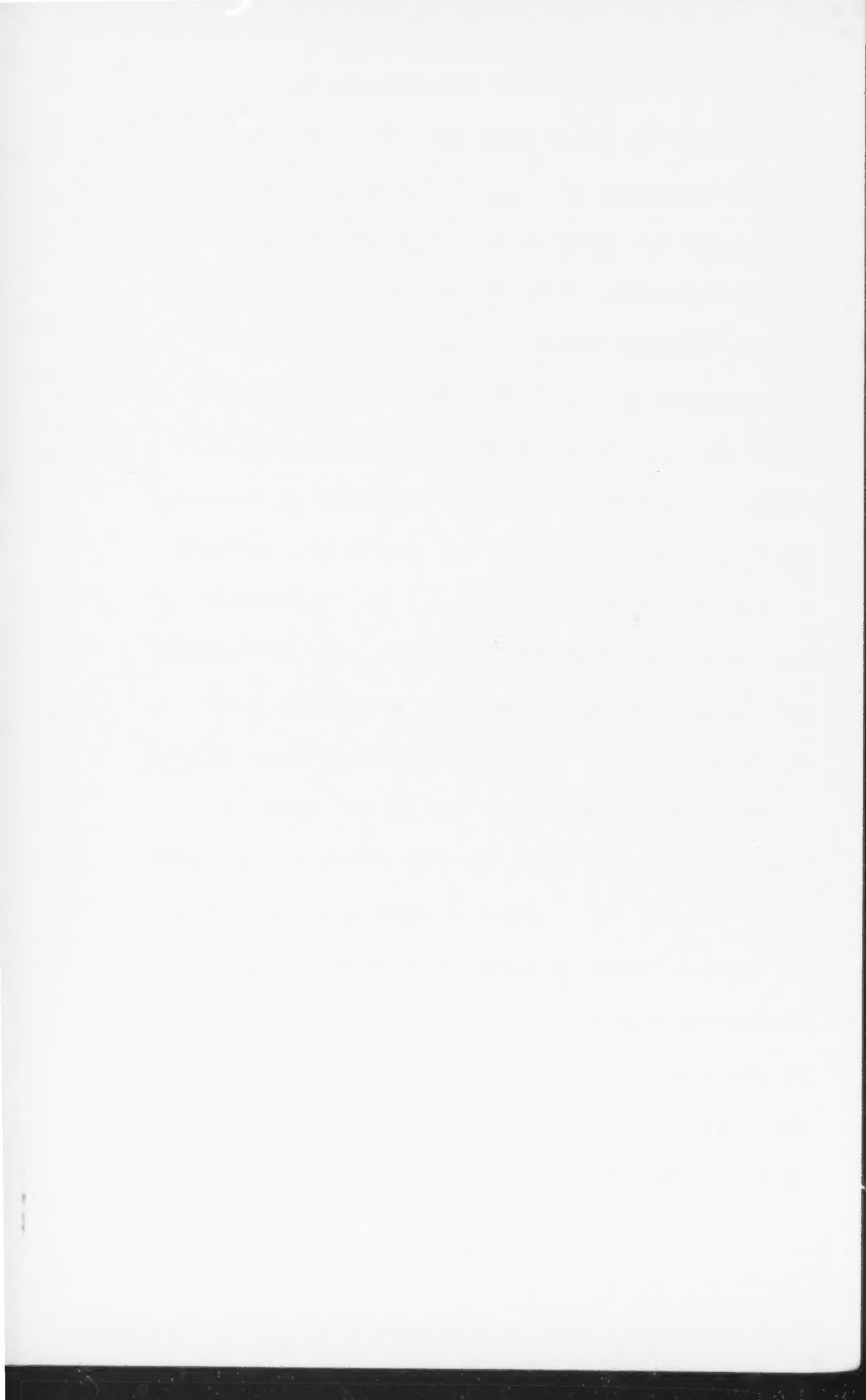


behalf of Mr. Sullivan. The Department, by letter dated May 22, 1967, advised Mr. Sullivan that the appeal was subject to dismissal because his agent and attorney-in-fact, Mr. McNutt, still had not shown himself qualified to practice before the Department. The letter even stated: "From the nature of the showing which he has attempted to make, it is obvious that Mr. McNutt is not qualified to practice before the Department." Nevertheless, it went on to advise: "However, the Department has adopted the practice of accepting appeals filed by an attorney-in-fact when his action has been ratified by the appellant."

Mr. Sullivan executed a formal ratification form before a notary public, in which he ratified and adopted the documents which had been filed on his behalf by Mr. McNutt. They had been entitled "Answer to Complaint", "Additional Showing as Required", "Notice of Appeal" and



"Appeal". The letter accompanying the ratification form gave Mr. Sullivan's return address as "Albright & Heaton, Attorneys at Law, 300 Title Insurance & Trust Building, 309 South Third Street, Las Vegas, Nevada 89101." The Department thereupon remanded the case to Hearing Officer (later renamed Administrative Law Judge) Dean F. Ratzman. He held a hearing on February 18, 1971, at which Mr. McNutt represented Mr. Sullivan. Mr. Sullivan testified on his own behalf. He already had seen the Government's proposed exhibits, and told Mr. Ratzman that they didn't reflect about \$15,000 worth of work he (Sullivan) had done on the claims, nor did they show" . . . what I have done in order to market this gravel." The Hearing Officers admitted the exhibits without objection, with the understanding that Mr. Sullivan could testify as to what he had done to market the gravel, and he and Mr.



McNutt could mark up the exhibits to illustrate other work that had been done, as revealed by testimony.

The Government's witness before the Hearing Officer was Thomas E. Schessler, a mining engineer and lands and minerals staff officer with the Las Vegas District of the Bureau of Land Management. He testified that, during the four years he had been stationed in Las Vegas, he had inspected twenty to thirty sand and gravel claims in the Las Vegas Valley. He also had studied a United States Geological Survey publication on Clark County and had researched work done by predecessor mining engineers in the Las Vegas office. Further, he had examined a mosaic aerial photograph of the area in which Mr. Sullivan's two claims were situate. The picture taking had occurred during an April 15, 1965, flight.



ground inspections revealed the removal of any significant amounts of materials.

On cross-examination by Mr. McNutt, Mr. Schessler acknowledged that he had been in the Las Vegas area only since 1966. As a result, his knowledge of sand and gravel sales in the area had been derived from a review of market sales. He conceded that large quantities of sand and gravel had been removed from land bordering Mr. Sullivan's claims.

Mr. Sullivan then testified on his own behalf. He said that he had had a rock crusher on the claims until 1957. Processing of the materials extracted had been done in North Las Vegas, where they had been taken by truck. All of the materials had been taken from a draw or wash, where they had been deposited during times of flood. Mr. Sullivan reported that a major flood had occurred in 1958. He believed that the new materials deposited by that



flood could have covered all evidence of the excavating work he had done previously.

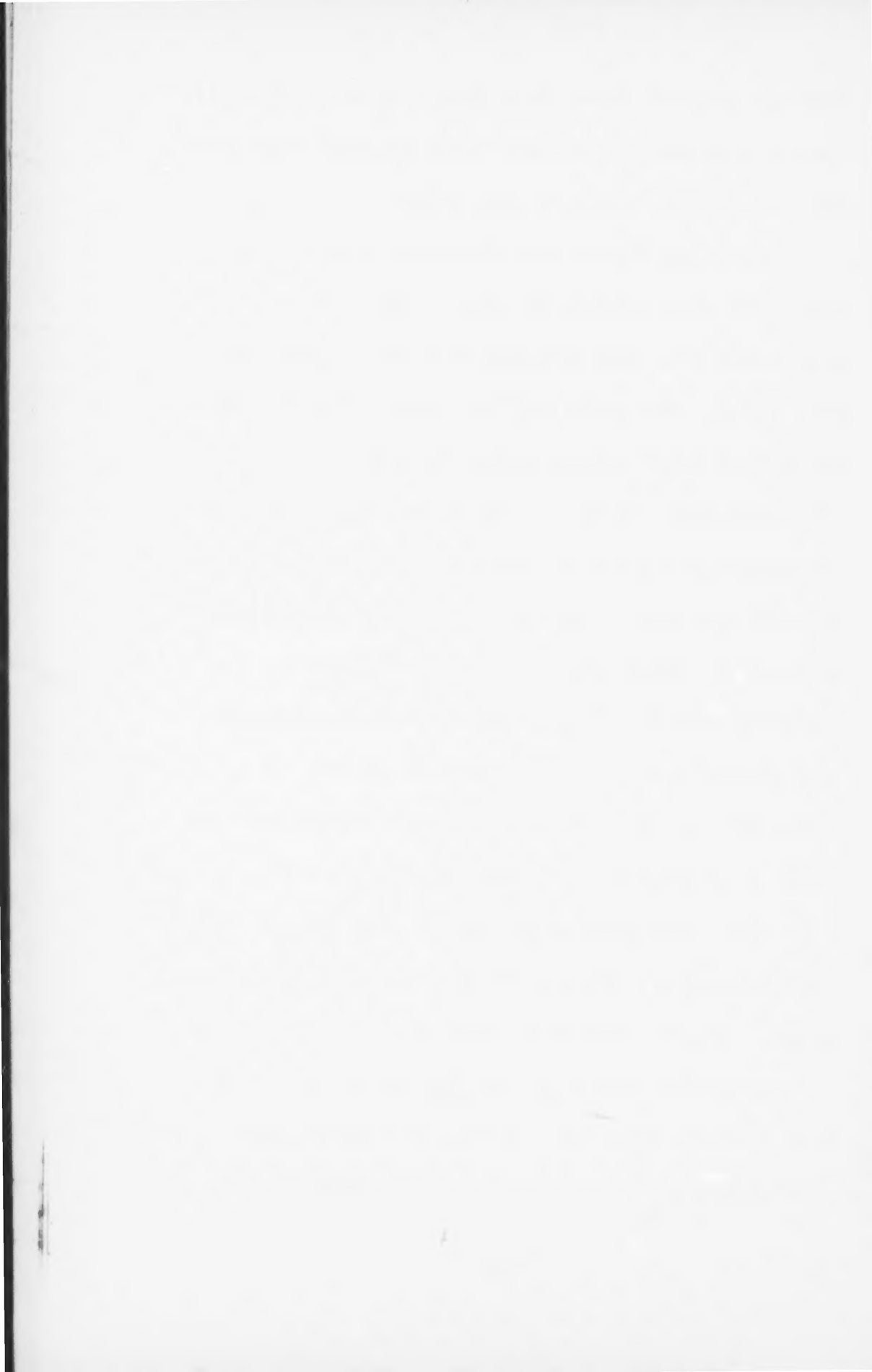
Mr. Schessler then was called back to the stand. He testified that characteristic color patterns would show in an aerial photograph of an area where an excavation had been followed by new flood deposits. Such color patterns are caused by the new growths of vegetation on those deposits. The aerial photograph of the two claims did not exhibit the characteristic color patterns that would support Mr. Sullivan's belief, in the expert witness' opinion. Nevertheless, he did not rule out the possibility that a subsequent flood could have obliterated Mr. Sullivan's excavations in the draw.

Hearing Examiner Ratzman authorized the filing of post-hearing briefs by both sides. Attached to the brief filed on behalf of Mr. Sullivan were four unsworn statements from third parties re the haul-

ing of gravel from his two claims. Two of the statements claimed that gravel had been hauled prior to July 23, 1955.

Hearing Examiner Ratzman's written decision was dated December 28, 1971. It declared the two mining claims to be null and void. He pointed out that the evidence revealed that there were large quantities of sand and gravel within the two claims; Charleston 24/39 alone could easily contain a million cubic yards. Further, he discussed in some detail the evidence as to whether sand and gravel had been removed and marketed from the claims prior to July 23, 1955. This evidence included the four aforementioned statements.

Mr. Ratzman's decision set forth the principles by which he had judged the case. First the Government had the burden of establishing a prima facie case. Then the burden shifted to the claimant, Mr. Sullivan, to show by a preponderance of



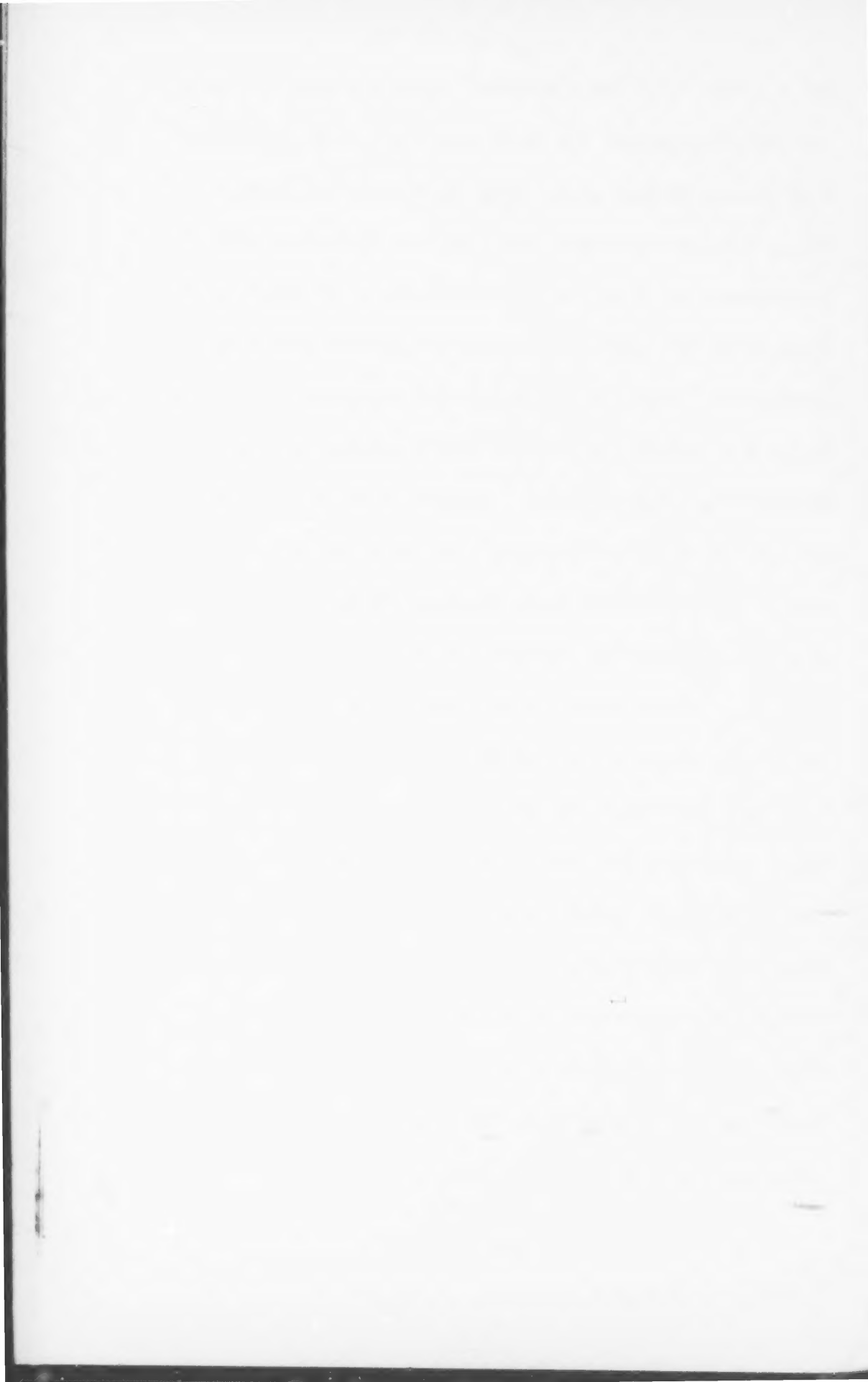
evidence that a discovery of valuable minerals had been made. This required evidence demonstrating that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine. Further, Mr. Ratzman's decision acknowledged that the "marketability test" had to be met. This necessitated evidence "showing that materials could have been extracted, removed and marketed at a profit" by July 23, 1955.

One way to make the showing would be for the claimant to present evidence that he had entered the race to supply the local demand for sand and gravel. The Hearing Officer found that the only significant utilization of sand and gravel prior to said date had been from nearby claims, but not from the two claims here involved. He stated that the limited demand for those materials had been readily satisfied from



existing sand and gravel operations. The decision summed up his reasons for finding the two claims null and void as follows: "The contestee has failed to show by the preponderance of the evidence (i) that any quantity of sand and gravel actually was marketed from the contested claims prior to July 23, 1955, or (ii) that under known marketing conditions, there was an outlet for profitable disposal of a substantial quantity of sand and gravel from the two contested claims prior to July 23, 1955."

Mr. Sullivan retained attorney Keith C. Hayes to appeal the decision of Hearing Officer Ratzman. Mr. Hayes' primary contention was that due process required the decision to be set aside and that Mr. Sullivan be given another opportunity to present his case, in order that additional evidence might be considered. The reason given for this argument was the representation of Mr. Sullivan by non-



lawyer Mr. McNutt before the Hearing Examiner. Attorney Hayes argued that neither Sullivan nor McNutt had been aware of the burden of proof imposed upon the claimant at the time of the hearing.

The appeal was considered by a three-man panel of the Interior Board of Land Appeals (IBLA), which affirmed the Hearing Officer's decision on February 6, 1973, in an unanimous opinion. It pointed out that Department of Interior regulations permitted a claimant to be represented by a lawyer, but did not require such representation. The opinion declares that in an administrative proceeding to determine the validity of a mining claim there is no denial of due process because the claimant is not represented by a lawyer; all that due process implies is notice and a hearing. The panel emphasized that Mr. Sullivan chose not to engage the services of a lawyer for the hearing, so that he "may not now be heard to complain."

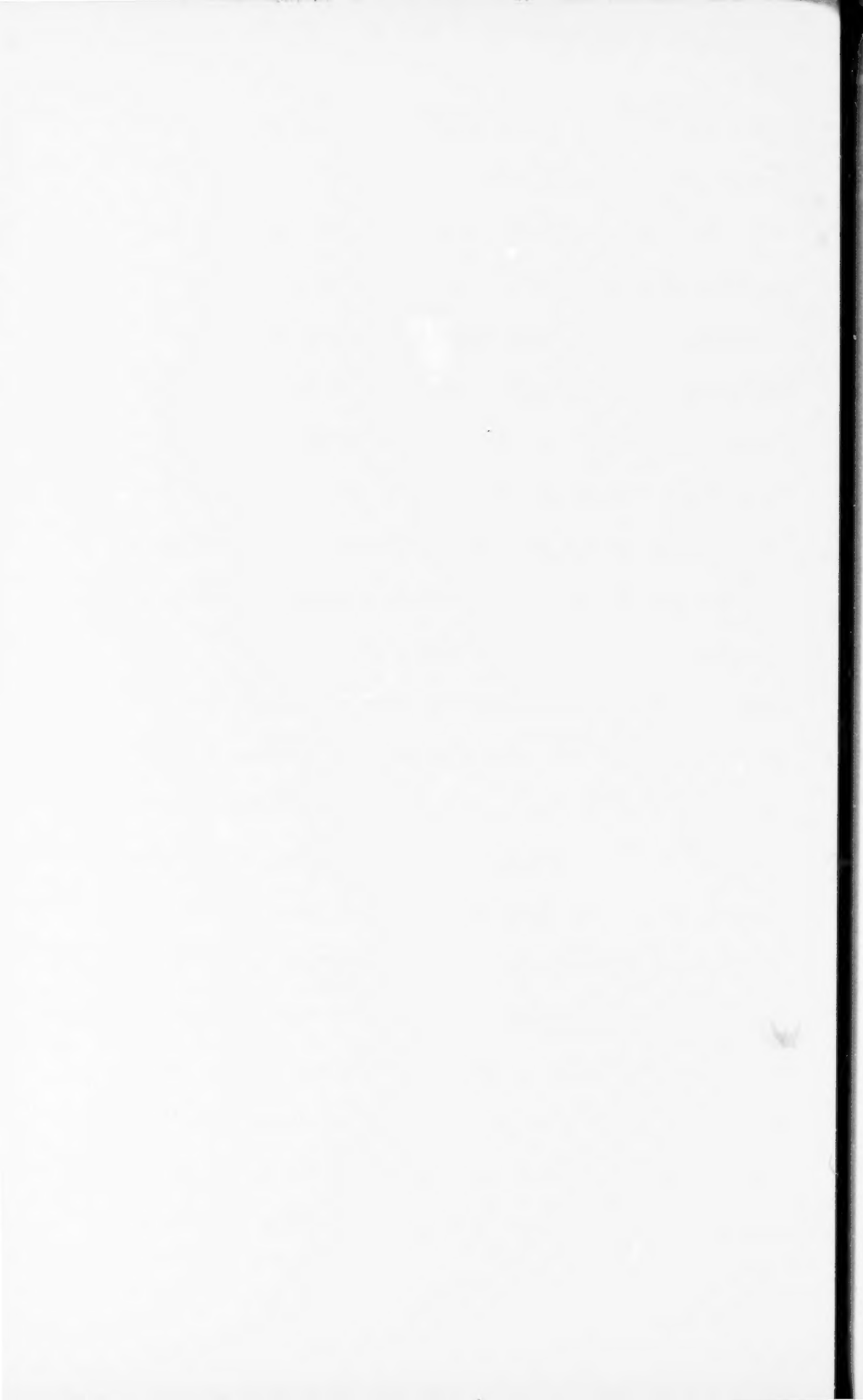
The Bureau of Land Management duly recorded a notice that the two mining claims had been adjudicated null and void. The recordation was made in the official records of the Clark County Recorder on February 26, 1973.

The plaintiff purchased the claims from Mr. Sullivan on March 7, 1979. By affidavit, he represents that he took an option on the two claims from Mr. Sullivan, who said that he owned them. Then, the plaintiff declares in his affidavit, he "went to the County Recorder and searched the record for evidence that Sullivan owned the Charleston claims, and found nothing that would indicate that the claims were not in good standing and then exercised my option and went to producing aggregate therefrom." Further evidence presented to this Court by the Plaintiff establishes that he has made a large investment in operating equipment on the claims and has



been producing vast amounts of sand and gravel materials there.

The Plaintiff has several objections to the Magistrate's report. First, he disagrees with the Magistrate's holding that he is limited, in this U.S. District Court action, to the issue raised before the IBLA; namely, the lack of due process resulting from Mr. Sullivan's not having a lawyer represent him before Hearing Officer Ratzman. He further objects to the Magistrate's conclusion that issues as to the validity of the claims had been waived by Sullivan's failure to raise them in his appeal to the IBLA. In addition, he takes issue with the Magistrate's conclusion that the administrative record reflects no evidence of any sales of or ability to sell sand and gravel from the claims prior to Mr. Sullivan's acquisition of them in 1959. The plaintiff objects in toto to Magistrate Atkins' recommendation to this



Court. She recommends that the plaintiff's motion to set aside agency action be denied, and that defendant United States' motion to dismiss the action be granted.

Discussion:

This Court essentially is reviewing the IBLA's affirmation of the Hearing Officer's decision adverse to the plaintiff. The scope of this review is quite limited. It consists of an examination to determine whether the agency action was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or not in accordance with the law.

Melluzzo v. Watt, 674 F.2d 819, 820 (9th Cir. 1982). In doing so, this Court does not reweigh the evidence or substitute its judgment for that of the administrative agency, Rawls v. United States, 566 F.2d 1373, 1376 (9th Cir. 1978); Baker v. United States, 613 F.2d 224, 226 (9th Cir. 1980).



Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support the agency's conclusion. United States v. Smith Christian Min. Enterprises, 537 F.Supp. 57, 62 (D.Ore. 1981). It is something less than the weight of the evidence; the possibility of reaching an opposite conclusion from the evidence does not prevent the administrative agency's holding from being supported by substantial evidence. Ibid. The record as a whole is looked at, Multiple Use, Inc. v. Morton, 504 F.2d 448, 452 (9th Cir. 1974), rather than merely the evidence that supports the agency decision. Charleston Stone Products Co., Inc. v. Andrus, 553, F.2d 1209, 1213 (9th Cir. 1977), rev'd on oth. gds. 436 U.S. 604 (1978). The claimant had to produce credible evidence, for the agency was not required to give any weight to testimony or other evidence which it did not believe. Osborne v. Hammit, 377 F.Supp. 977, 985 (D.Nev. 1964).



The testimony of the Government's expert, Mr. Schessler, constituted sufficient substantial evidence to constitute a prima facie case. He testified that he had examined the claims and the sand and gravel there could not have been mined and marketed at a profit on or before July 23, 1955. His testimony was not contradicted by evidence that substantial amounts of the materials had been mined or marketed prior thereto. See McCall v. Andrus, 628 F.2d 1185, 1189 (9th Cir. 1980); see also Russell v. Peterson, 498 F.Supp. 8, 9-10 (D.Ore. 1980).

If supported by substantial evidence in the record, the agency's findings of fact are conclusive. Converse v. Udall, 399 F.2d 616, n.1 (9th Cir. 1968). Therefore, judicial review is not procedurally a trial de novo. Doria Min. & Engineering Corp. v. Morton, 608 F.2d 1255, n.5 (9th Cir. 1979). Judicial review is confined to

the agency record, and it is not appropriate for the reviewing court to consider new evidence. United States v. Smith Christian Min. Enterprises, 537 F.Supp. 57, 63 (D.Ore. 1981). An exception is recognized when the party seeking review alleges that he has discovered new evidence showing that the administrative decision was obtained by fraud. Doria Min. & Engineering Corp. v. Morton, supra at 1258. No such allegation has been made here.

Absent exceptional circumstances, a reviewing court will refuse to consider contentions not presented before the administrative proceeding at the appropriate time. Getty Oil Co. v. Andrus, 607 F.2d 253, 256 (9th Cir. 1979). It is for the agency, not the courts, to determine whether the administrative record should be reopened to consider new facts, unless the failure to reconsider can be characterized an abuse of discretion. Nance v.



Environmental Protection Agency, 645 F.2d 701, 717 (9th Cir. 1981). Since the IBLA refused attorney Hayes' request that the record be reopened to allow the introduction of further evidence, this Court allowed additional exhibits to be submitted in order to help determine whether the IBLA's refusal was an abuse of discretion. Although a statistical exhibit does indicate a significant growth in demand for sand and gravel in the Las Vegas Valley tonnagewise as early as 1955, the same exhibit shows no increase in average price per ton until 1958. The inference is that existing sources of supply easily accomodated the larger demand in 1955. Even if the new evidence had been considered by the Hearing Officer or the IBLA, it would not have been manifestly unjust for the agency to have declared the claims null and void for failure of the claimant to show marketability with a reasonable expectation of profit.

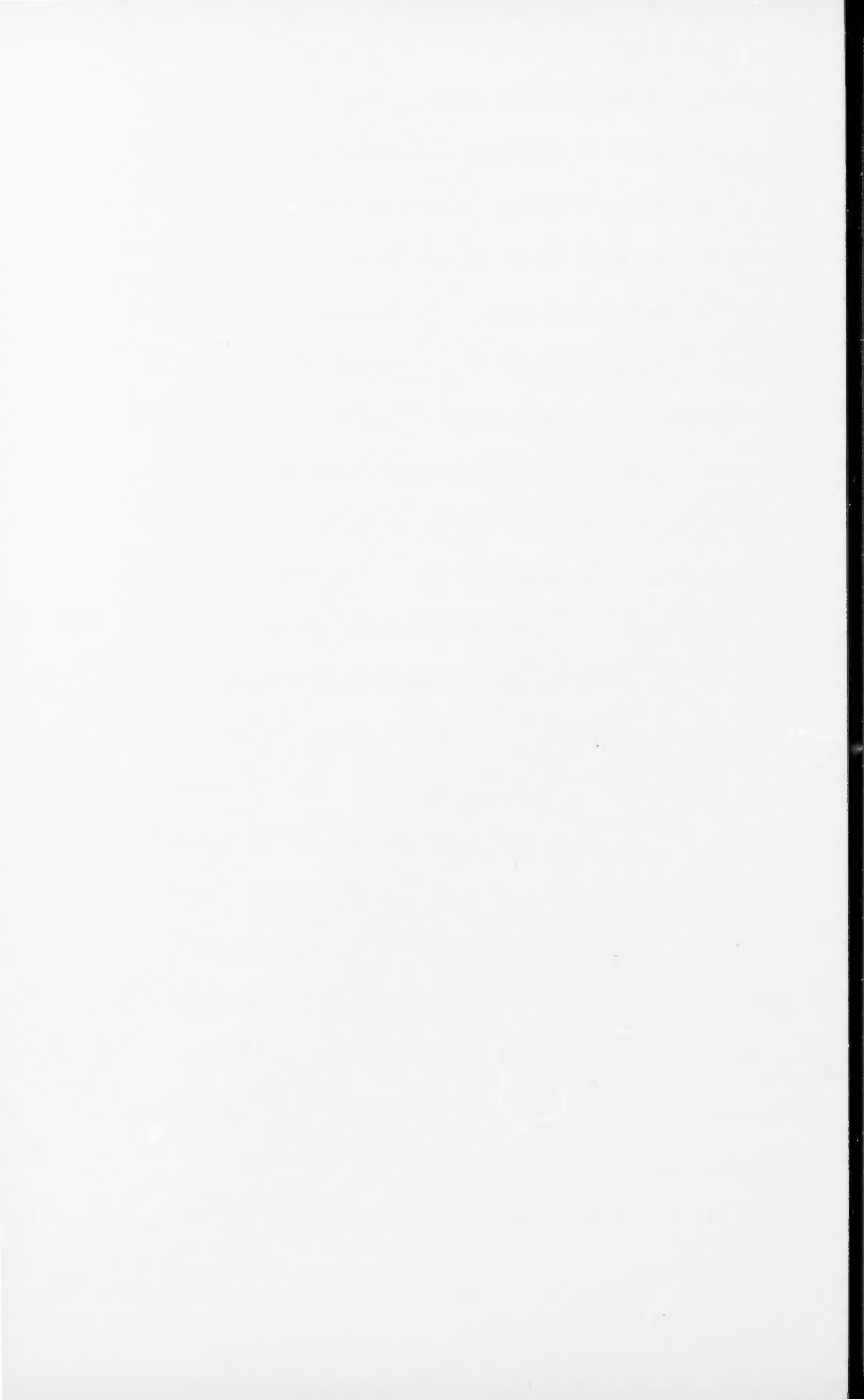


The trier of fact has not abused its discretion unless there is a definite and firm conviction that it committed a clear error of judgement in the conclusion it reached upon a weighing of the relevant factors. Anderson v. Air West, Inc., 542 F.2d 522, 524 (9th Cir. 1976). At least two factors are present here that prevent such conviction from arising. First, the agency originally balked at allowing Mr. McNutt to represent Mr. Sullivan. It required a deliberate ratification by Sullivan of McNutt's representation before the latter was allowed to practice before the Hearing Officer. The right to counsel can be waived. United States v. Weiner, 578 F.2d 757, 774 (9th Cir. 1978). The due process right to counsel in a civil action ordinarily requires no more than a right to retain counsel if one so desires. See Goldberg v. Kelly, 397 U.S. 254, 270 (1970). In a review of a Securities and

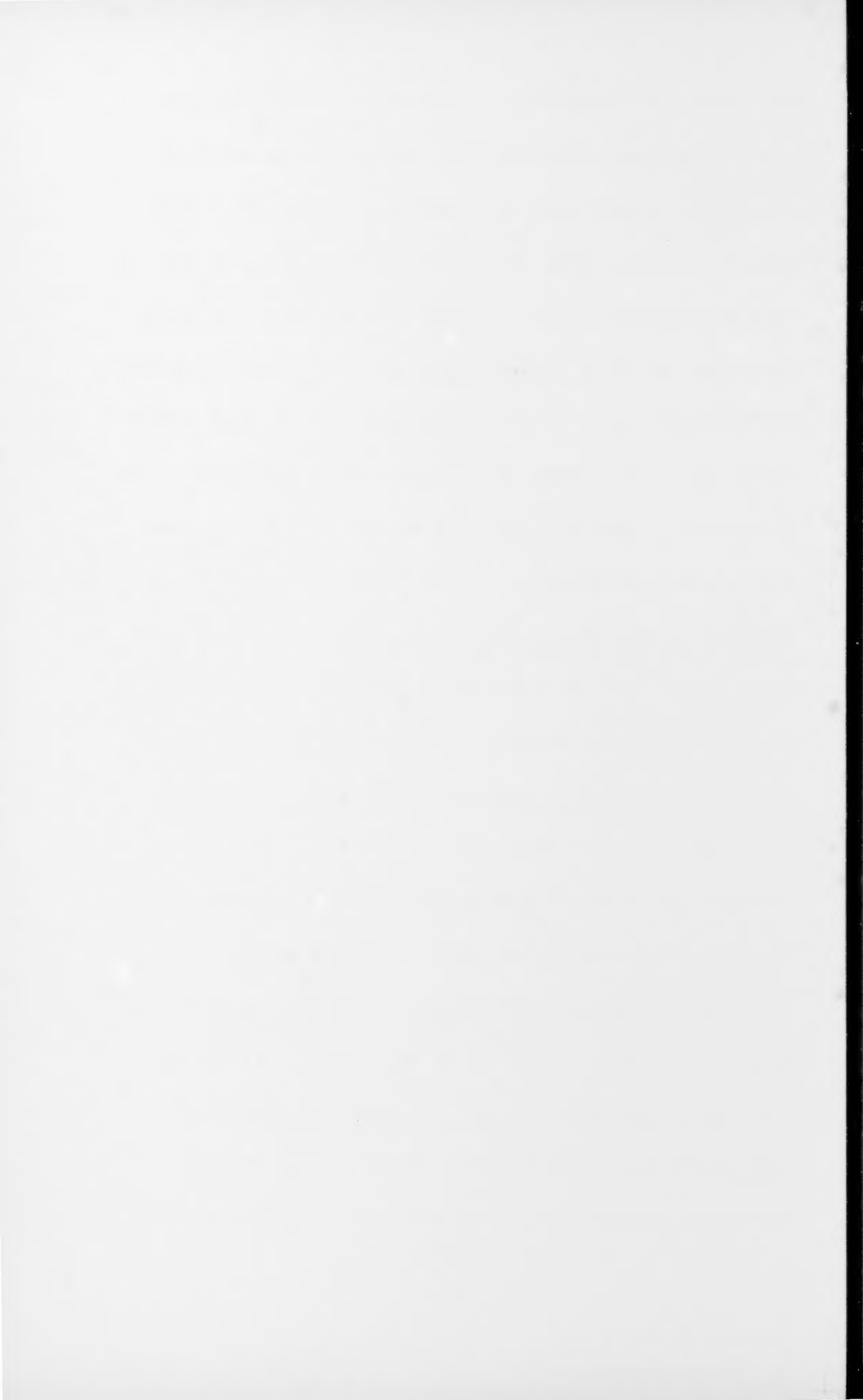


Exchange Commission decision, the Ninth Circuit denied the petitioner's contention that he should be granted a new hearing because he had failed to avail himself of counsel before a hearing examiner. Nees v. Securities and Exchange Commission, 414 F.2d 211, 221 (9th cir. 1969). The petitioner's request for a new hearing was denied because (1) he had been afforded an opportunity to employ counsel for the hearing, (2) no one deprived him of that right, and (3) the Government was not obligated to provide him with counsel. Ibid. The same may be said of Mr. Sullivan. Since the plaintiff stands in the shoes of Sullivan, the identical reasoning applies to him.

The second factor which militates against this Court holding that the administrative agency abused its discretion concerns the plaintiff directly, and not as the successor in interest of Mr. Sullivan. That factor is the effect of



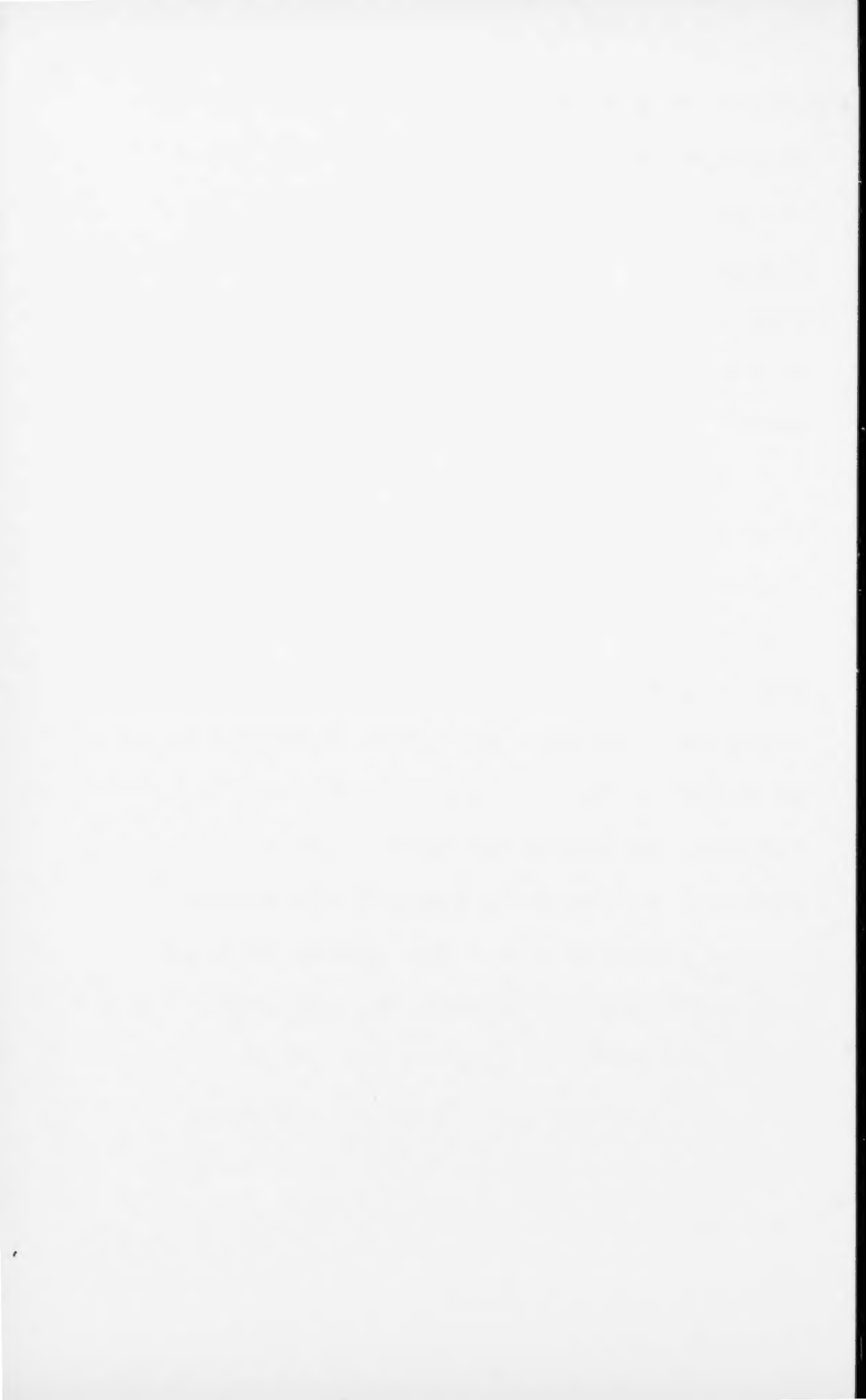
Nevada's recording statutes. The notice that the two claims had been adjudicated null and void was properly recorded. See NRS 247.120, NRS 517.110. From the time of its recordation it imparted notice to all persons of its contents, so that subsequent purchasers are deemed to purchase and take with notice. NRS 111.320; NRS 247.190. As a result, the plaintiff does not have the status of either a bona fide purchaser, Hewitt v. Glaser Land & Livestock Co., 97 Nev. 207, 626 P.2d 268, 269 (1981), or a good faith purchaser. Allison Steel Manufacturing Co. v. Bentonite, Inc., 86 Nev. 494, 471 P. 2d 666, 669 (1970). He is deemed to have knowledge of the contents of the recorded notice and is not permitted to disclaim that knowledge. See White v. Moore, 84 Nev. 708, 448 P.2d 35, 36 (1968); All Am. Van & Storage v. DeLuca Realty, Inc., 95 Nev. 253, 592 P.2d 951 (1979). It is well established that one who is not a



bona fide purchaser can acquire no greater interest in the property than that which the grantor had to convey. Willis v. Stager, 481 P.2d 78,83 (Or. 1971). At the time the plaintiff purchased Mr. Sullivan's purported mining claims, the latter had no such interest to convey.

The plaintiff's objection to the portion of the Magistrate's report that declares there was no evidence in the transcript of any sales or ability to sell from the claims prior to 1959 is technically well taken. Some such evidence is to be found in the administrative record. However, as discussed above, there is substantial evidence to support the agency action nevertheless. The upshot is that proving his point avails the plaintiff nothing.

The correct standards of law were applied by the Hearing Examiner. The prudent man test and the marketability test



both were applicable. Andrus v. Shell Oil Co., 446 U.S. 657, n.4 (1980); Edwards v. Kleppe, 588 F.2d 671, 672 (9th Cir.

1978). The marketability test is usually the critical factor in cases involving nonmetallic minerals of widespread occurrence. United States v. Coleman, 390 U.S. 599, 603 (1968). In his brief filed subsequent to the February 18, 1971, hearing before hearing Officer Ratzman, Mr.

Sullivan acknowledged that: "Subject to the usual minor differences, the sand and gravel material on the two contested claims is similar to and is useable for the same general construction and building purposes as other sand and gravel deposits in the Las Vegas area." The fact that the Las Vegas Valley is full of sand and gravel has been noted. Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959).

The fact that the plaintiff has demonstrated that he has been marketing large



quantities of sand and gravel from the claims doesn't establish that the materials could have been marketed with a reasonable expectation of profit on or before July 23, 1955. The burden of showing such marketability rested on Mr. Sullivan. See Verrue v. United States, 457 F.2d 1202, 1203 (9th Cir. 1972); Multiple Use, Inc. v. Morton, 353 F.Supp. 184, 190, 195 (D.Ariz. 1972), aff'd 504 F.2d 448 (9th Cir. 1974).

As modified and supplemented hereinabove, the Court accepts the Magistrate's report and the findings contained therein. The Court accepts the recommendation of the Magistrate.

IT IS, THEREFORE, HEREBY ORDERED that the plaintiff's motion to set aside agency action be, and the same hereby is DENIED.

IT IS FURTHER ORDERED that the motion to dismiss of defendant United States of America be, and the same hereby is, GRANTED.



DATED: December 30, 1982.

UNITED STATES DISTRICT JUDGE

CHARLESTONE STONE PRODUCTS

CO., INC. a corporation,

Plaintiff-Appellee,

v.

Cecil D. ANDRUS, Secretary of the
Interior,* and United States of
America, Defendants-Appellants.

No. 75-1532.

United States Court of Appeals,
Ninth Circuit.

May 12, 1977.

Secretary of Interior initiated
contest complaint attacking validity of
placer sand and gravel mining claims filed
in 1942. Only one claim was found to be
valid, and judicial review was sought. The
United States District Court for the
District of Nevada, Bruce R. Thompson, J.,
held that 15 other claims were valid and

*Rogers C. B. Morton, as Secretary of Interior, was the
originally named Secretary. We note the name of his
present successor in office.



that title holder was entitled to access to another claim in order to utilize water produced from well thereon, and appeal was taken. The Court of Appeals, East, Senior District Judge, held that: (1) Board of Land Appeals improperly credited mining engineer's unfounded opinion of nonvalidity; (2) seemingly sporadic operations which were a mirror of building and construction industry in the area during and shortly after World War II did not preclude a finding of validity; and (3) title holder was entitled to access to a 17th claim in order to utilize water recovered from well thereon in operation of other valid claims.

Affirmed.

1. Mines and Minerals 40

In determining validity of placer sand and gravel mining claims filed in 1942 the Board of Land Appeals improperly credited mining engineer's opinion of nonvalidity



where there was no indication that he was familiar with the area during the crucial period and his opinion was not based on personal knowledge of the relevant market and, more importantly, his opinion was flatly contradicted by prior report based on investigation completed within one year of the crucial period and also by direct evidence of marketability supplied by persons who actually witnessed substantial recoveries from the claims. 30 U.S.C.A. §611.

2. Mines and Minerals 17(1)

Marketability of pre-July 23, 1955 extraction from placer sand and gravel mining claims could be tested by factors of accessibility, bona fides of the operators in developing the claims, existence of market demand within reasonable proximity to the claims and actual participation in the market. 30 U.S.C.A. §611.



3. Mines and Minerals 23(1)

Continuous operation of a placer mining claim is not a prerequisite to proving validity of that claim; reason dictates that periodic cessation of operation, short of intentional abandonment, need not defeat ultimate proof of validity; since a total absence of operation does not preclude a finding of validity, it follows tht sporadic operation does not preclude a finding of validity.

30 U.S.C.A. §611.

4. Mines and Minerals 23(1)

The prudent person test for determining validity of a placer mining claim has enough flexibility to allow a sand and gravel business operator to undertake an apparently marginal enterprise if it has a reasonable probability of success; placer sand and gravel mining claims, which were filed in 1942, were not invalid merely because of seemingly



sporadic operations where such operations were a mirror of the building and construction industry in the area during and shortly after World War II. 30 U.S.C.A. §611.

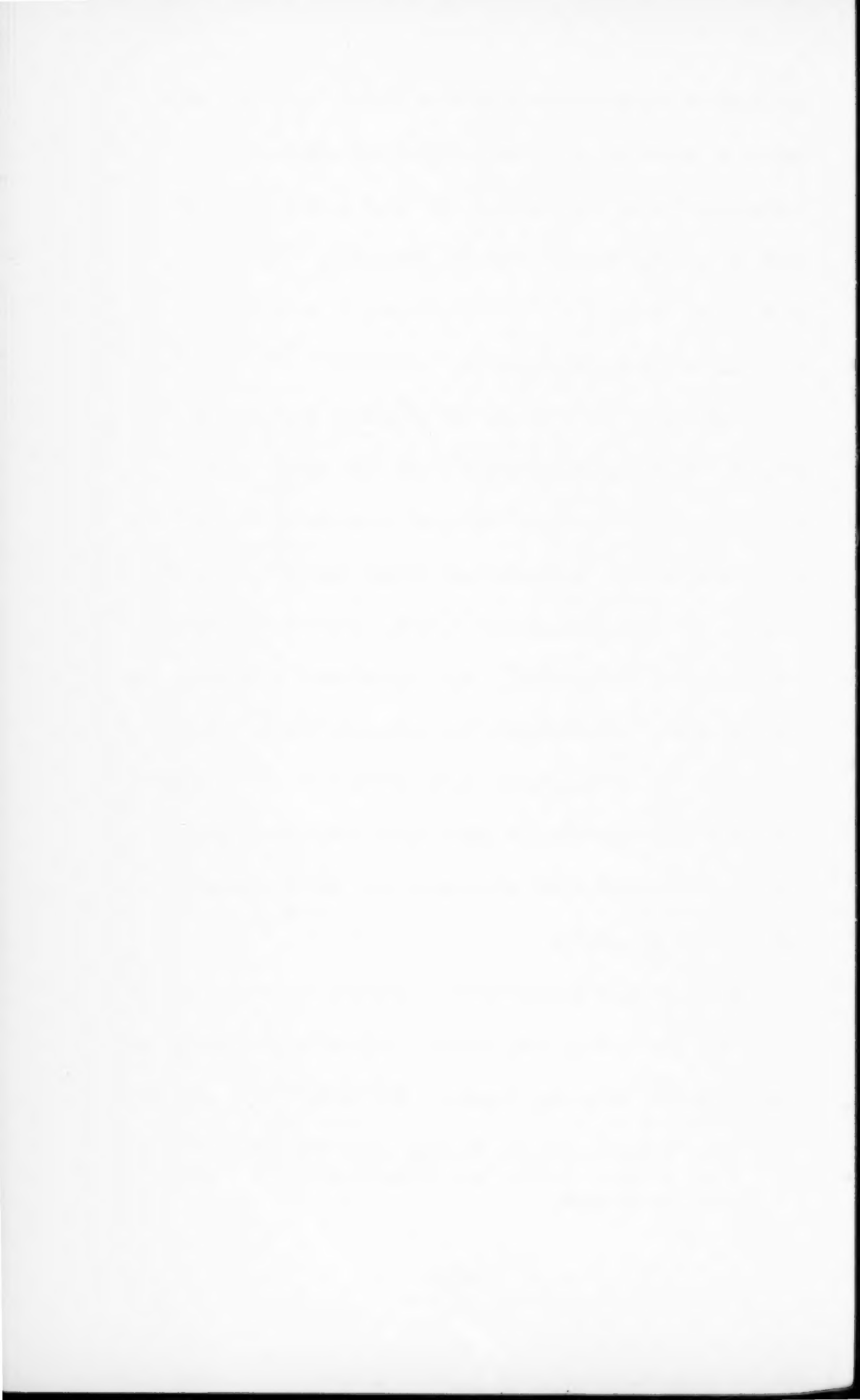
5. Mines and Minerals 29(3)

Holder of title to placer sand and gravel mining claims filed in 1942 was entitled to access to one claim in order to utilize water recovered from well on such claim in operation of other valid claims; record title holder, as original claimant's successor, had right to appropriate and utilize as a mineral the water within any of the claims which met the two-pronged test of value and success in development. 30 U.S.C.A. §611.

6. Mines and Minerals 29(3)

Water is a "mineral" within meaning of the placer mining laws. 30 U.S.C.A. §611.

See publication Words and Phrases for other judicial constructions and definitions.



7. Mines and Minerals 17(1)

Although critical date for determining validity of placer sand and gravel mining claims was July 23, 1955, date after which common variety sand and gravel deposits were no longer locatable, it was of no importance that discovery of water on one claim, which water was sought to be used to wash sand and gravel mined from other claims, occurred after July 23, 1955. 30 U.S.C.A. §611.

Appeal from the United States District Court For the District of Nevada.

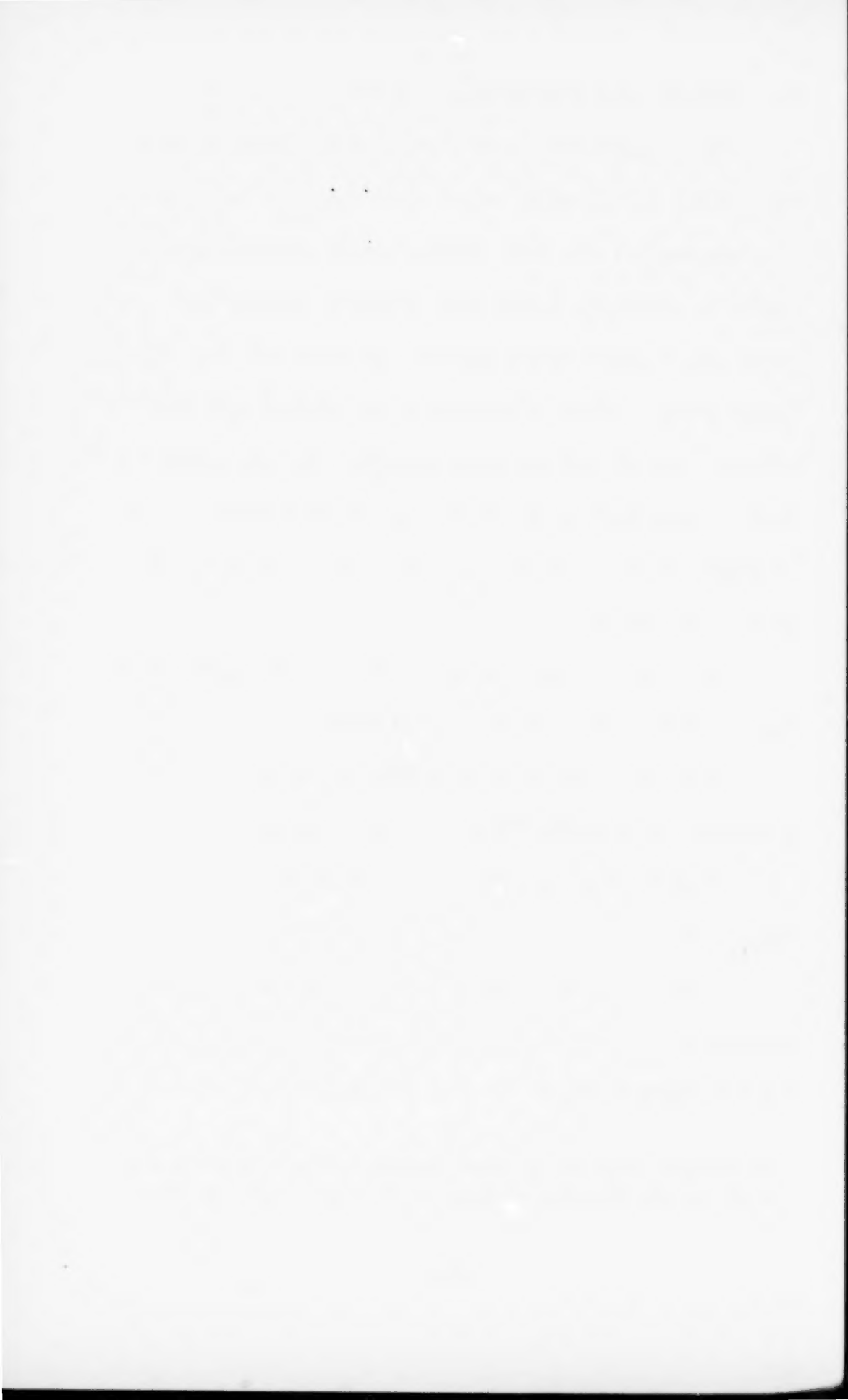
Before TRASK and GOODWIN, Circuit Judges, and EAST,** District Judge.

EAST, Senior District Judge:

The Cause:

Cecil D. Andrus, for the defendants-appellants, as Secretary of Interior, (Secretary) appeals the judgment of the

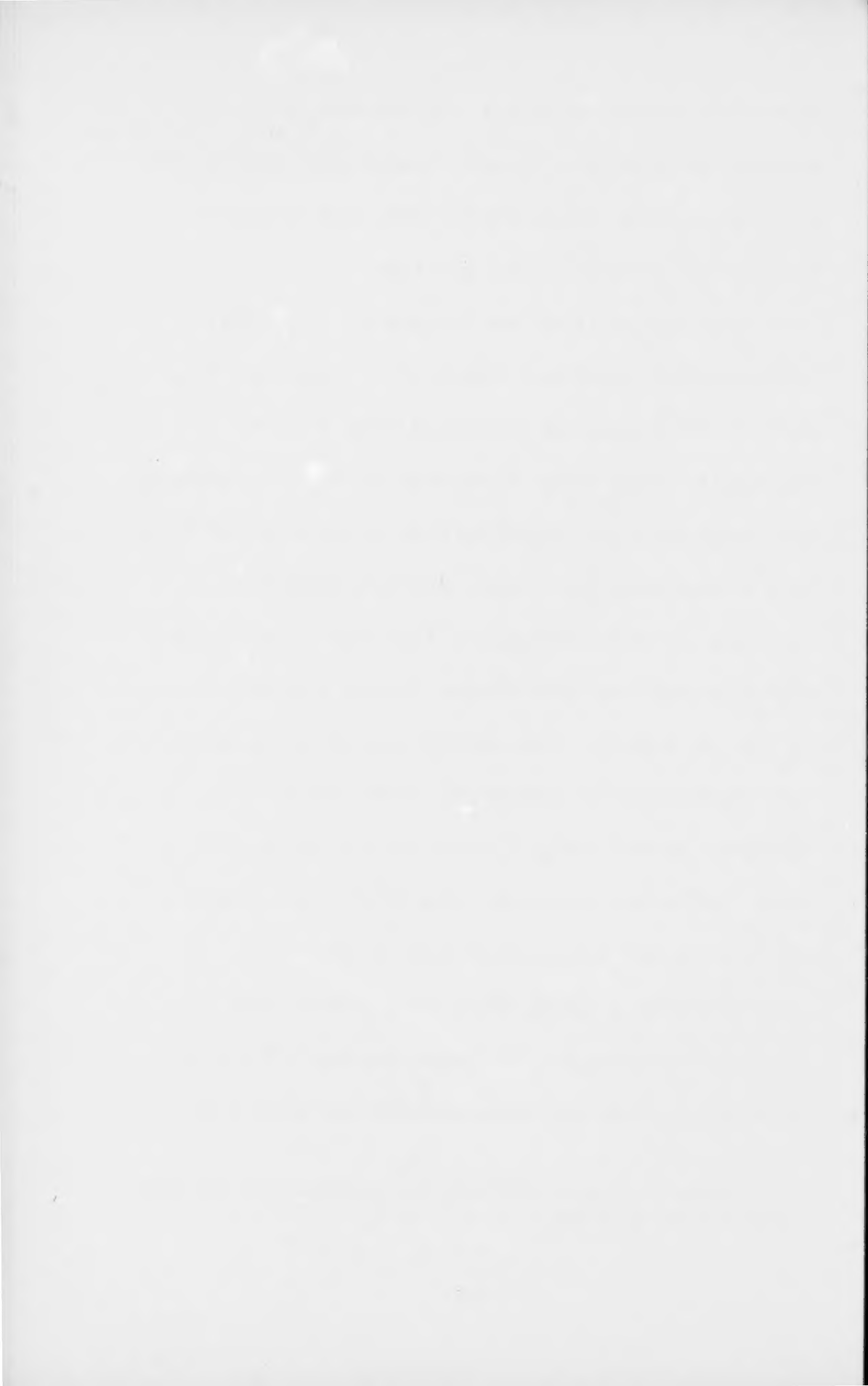
**Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.



District Court holding valid and granting access to certain placer sand and gravel mining claims located in the Las Vegas Valley in Nevada. We affirm.

The Secretary on November 17, 1965 initiated a contest complaint against the plaintiff-appellee Charlestone Stone Products Co., Inc. (Charlestone), attacking the validity of Charlestone's placer mining locations for sand and gravel numbered 1 through 22 and numbered 12A and 13A.¹ The Administrative Law Judge found Claims 9 and 10 to be valid. On cross-appeals, however, the Secretary's Board of Land Appeals (Board) found only Claim 10 to be valid. Upon judicial review, the District Court, believing an injustice had been accomplished, held that "at least the claims 1 through 16" were valid. It also held that Charlestone should be granted

1. Claims numbered 12A and 13A located after the year 1955 are not an issue.



access to Claim 22 in order to utilize, in the operations of the valid claims, the water produced from a well driven on Claim 22.

Issues on Review:

While the Secretary asserts the issues on review in different terms, we deem the pertinent issues to be:

(1) Whether, upon construing the record as a whole, the Secretary's finding that only Claim 10 was valid is supported by substantial evidence. *Multiple Use, Inc. v. Morton*, 504 F.2d 448, 452 (9th Cir. 1974); *White v. Udall*, 404 F.2d 334, 335 (9th Cir. 1968); and *Henrikson v. Udall*, 350 F.2d 949, 950 (9th Cir. 1965), cert. denied, 384 U.S. 940, 86 S.Ct. 1457, 16 L.Ed.2d 1538 (1966).

(2) Whether Charlestone met the two prong test of establishing: (a) A discovery of a valuable deposit of sand and gravel on



each of its claims; and (b) The intrinsic value of the sand and gravel deposits was such as "would justify a person of reasonable prudence in making further expenditures upon the property with a reasonable prospect of success in developing a valuable mine."² United States v. Coleman, 390 U.S. 599, 88 S.Ct. 1327, 20 L.Ed.2d 170 . . . (1968)." Clear Gravel Enterprises, Inc. v. Keil, 505 F.2d 180 (9th Cir. 1974), cert. denied, 421 U.S. 930, 95 S.Ct. 1657, 44 L.Ed.2d 87 (1975);

2. That is, whether the sand and gravel "in question could be extracted, removed and marketed at a profit on . . . July 23, 1955 when common variety sand and gravel deposits as here involved became no longer locatable. 30 U.S.C. §611. United States v. Barrows, 401 F.2d 749 (9th Cir., 1968), cert. denied, 394 U.S. 974, 89 S.Ct. 1468, 22 L.Ed.2d 754 . . . (1969)." Clear Gravel Enterprises, supra at 180-81. Section 611, in its pertinent parts, reads: "No deposit of common varieties of sand, stone, gravel . . . shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit."

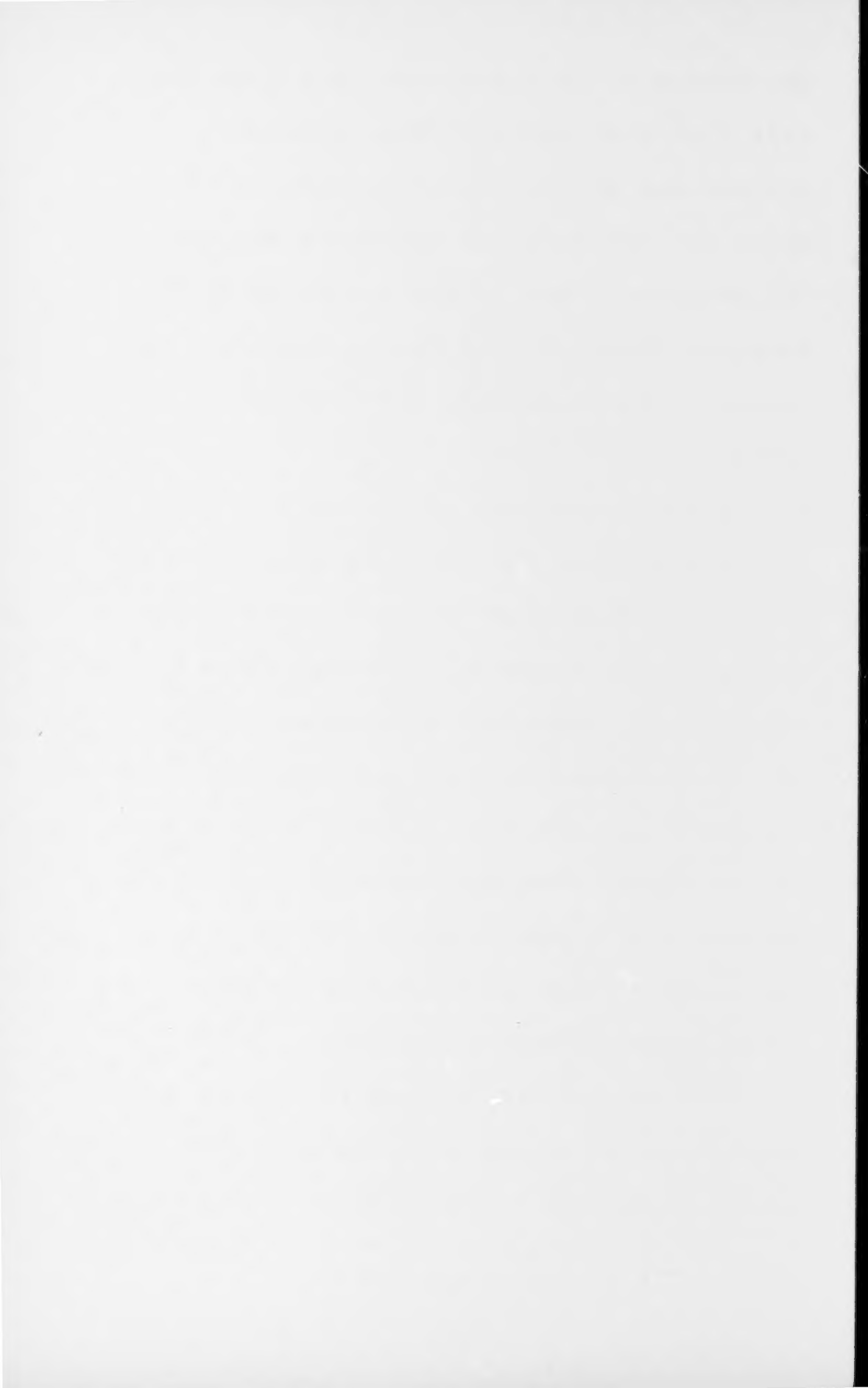


and Verrue v. United States, 457 F.2d 1202, 1203 (9th Cir. 1972). "The reasonably prudent man we are concerned with is the miner who has made his discovery and not the prospector who is still looking." Humboldt Placer Mining Co. v. Secretary of Interior, 549 F.2d 622, 624 (9th Cir. 1977).

Filing and operations of Claims:

Pursuant to the existing statute, A.M. Murphy and Fred Pine (Murphy) filed placer mining claims numbered 1 through 22 on February 18, 1942 in a surface water wash of the Las Vegas Valley some 15 miles distant from the then center of the city of Las Vegas. The aggregate acreage of the several claims approximated 450 acres and contained a later estimated 20 million cubic yards of sand and gravel.

The evidentiary record is replete with eyewitness testimony that the sand and gravel contained in the area of the claims



was of excellent quality for various construction uses and had value as such.

Shortly after the location and filing of the claims, Murphy's assignee, Southern Nevada Industries, Inc. (Southern), began operation within the confines of the claims and removed some 100,000 yards of material from a number of places up and down the wash. Due to the absence of washing water, Southern transported the raw materials to a site some five miles distant for crushing, screening, and washing. The refined material was used in the construction of an air force base situated northeast of Las Vegas. Southern closed the operation in 1943 and moved to an area near Henderson, Nevada for participation in a World War II construction project in that area. Thereafter, during the remainder of World War II and its aftermath, private construction in the area was curtailed.



From September, 1954 until during the year 1957, one E. H. Brawner (Brawner), as lessee of the claims, operated under a royalty agreement of not less than \$200 per month. It is undisputed that at this time Brawner's sand and gravel operation was farther from Las Vegas than were the operations of his competitors. Brawner's operation was also hampered to some extent by the absence of a water supply. Nevertheless he continued to operate the crushing plant within the limits of Claim 10 and materials were extracted from the crusher area and "pit" located within that claim and from other claims in the canyon. The market demand for the various types of sand and gravel, together with the lay of the various materials, dictated the location of the extractions. Brawner made profitable sales of the extracted materials through the year 1957.

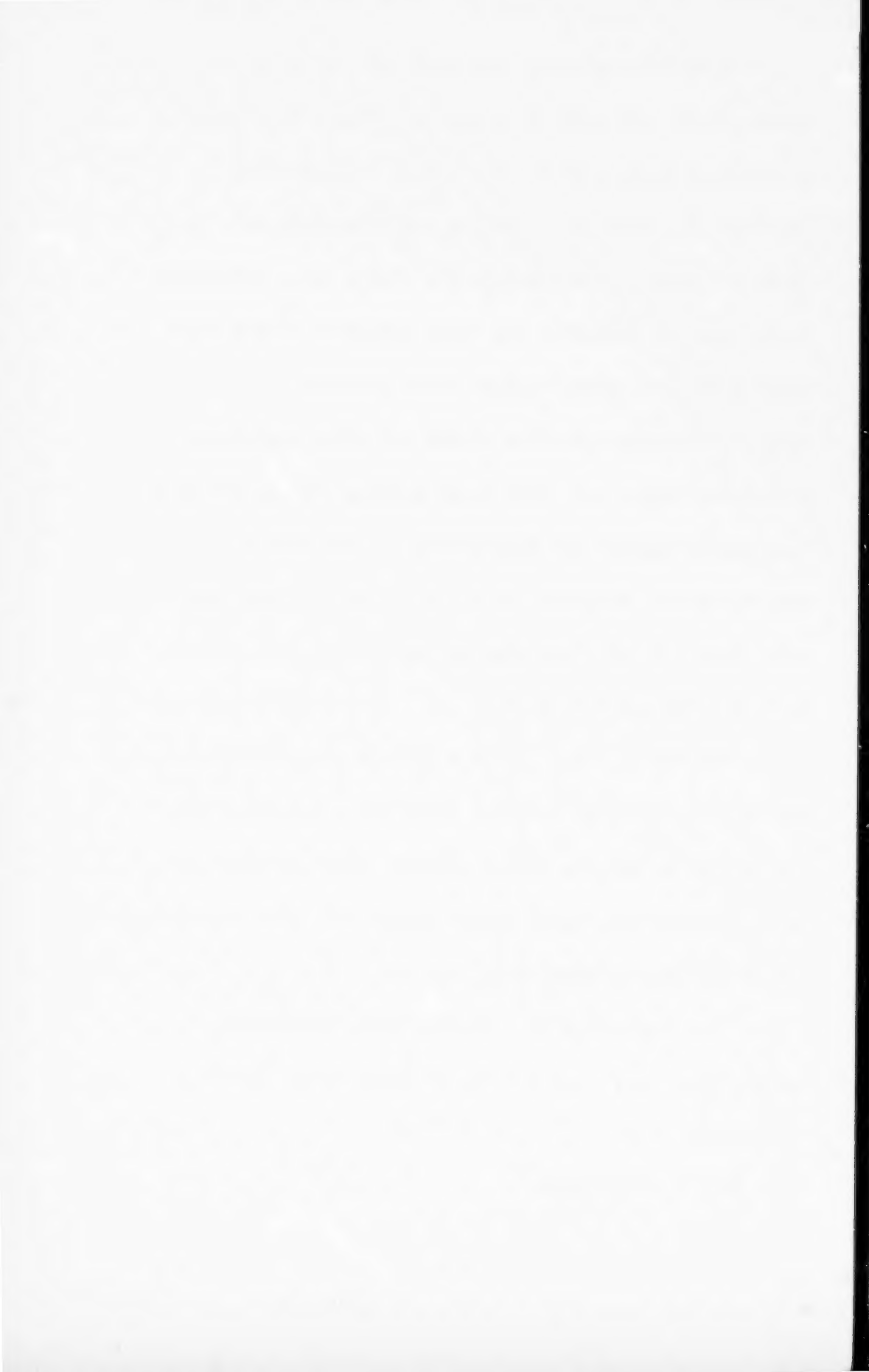


The foregoing narration carries the operation on the claims through the critical pre-July 23, 1955 discovery period.³ The following narration of operations subsequent to July 23, 1955 is pertinent, first, to the extent that the facts might bear upon the proper application, at the time of the contest proceedings, of the two prong "value" and "prudent man" or marketability test enunciated above; and, secondly, to the continuity of the marketability of the extracted materials.

On April 9, 1959, Frank R. Sullivan obtained title to the claims, extracted materials which were later stockpiled on the property, and sold some of the material as roofing granules.

On January 5, 1960, Charlestone acquired title to the claims and during

3. See note 2, supra.



1961 Morrison-Knudsen, Inc., as lessee, entered the claims, constructed a screening plant within the confines of Claim 10 and carried on processing operations.

Unsuccessful efforts were made to drill screening water wells within Claims 9 and 10, and in 1962, at the cost of some \$3,000, a well supplying adequate washing water was located within Claim 22. On July 15, 1964, Charlestone leased Claims 1 through 16 to Arden Sand and Gravel Co. (Arden) for a period of five years with an annual royalty of \$12,000. Although Charlestone retained Claims 17 through 22, it agreed to furnish Arden with electrical power and washing water from the well within Claim 22.

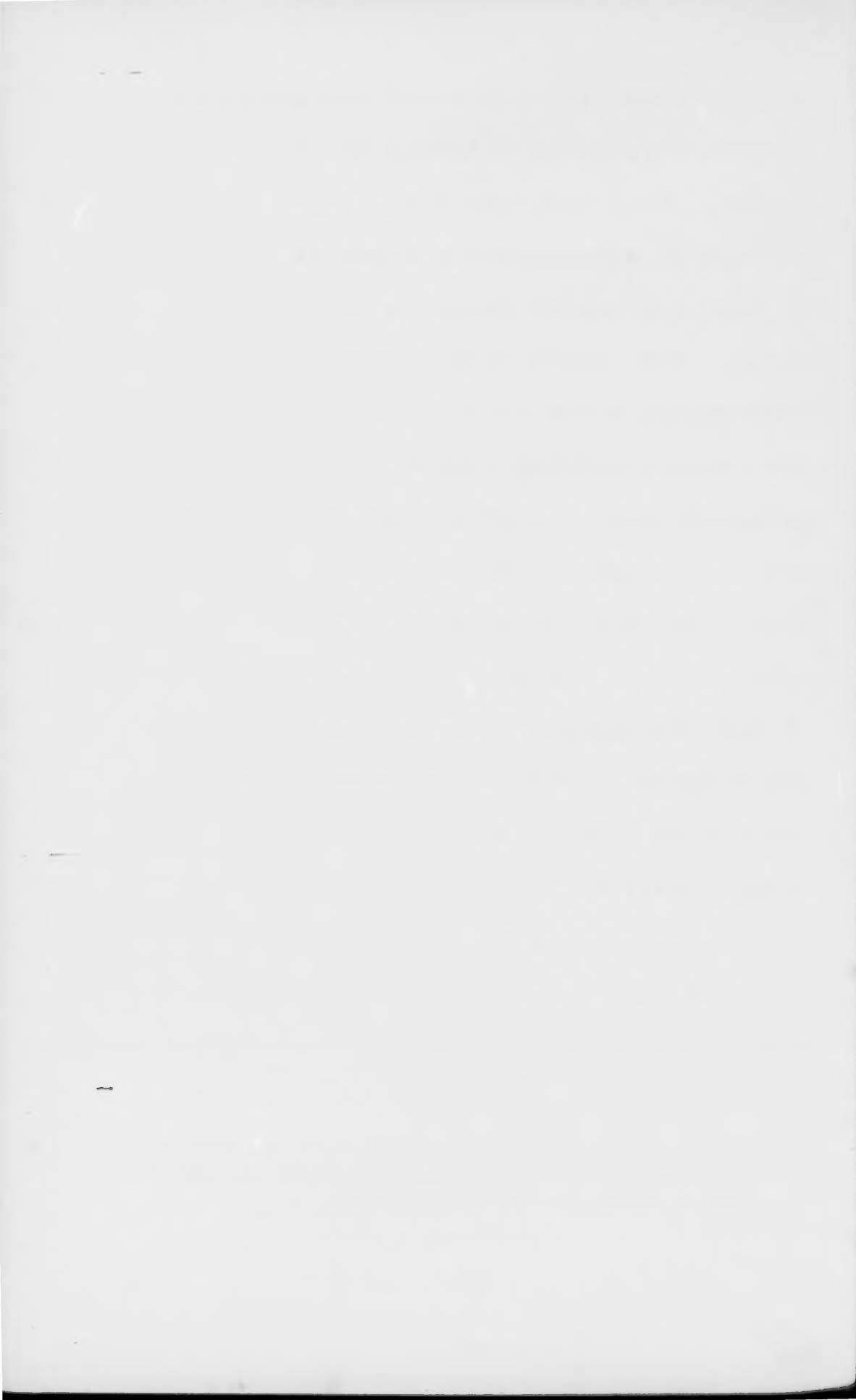
Action of the Secretary:

During the summer of 1956 while the Brawner operations were in progress, the United States Bureau of Land Management in Nevada employed Messrs. Hill and Lovejoy

(Hill), competent engineers and surveyors, to investigate the validity of the instant claims. Hill reported that Claims 1 through 22 encompassed a valuable discovery of sand and gravel deposits and were valid. The report constituted a comprehensive and informative discussion of the factors bearing upon a determination of marketability of sand and gravel deposits and of the quality of particular sand and gravel deposits as of July 23, 1955. After submission of the Hill report, the Bureau of Land Management affirmed the validity of the Brawner claims and removed the area of the claims from an open small tract classification.

Nine years later the Secretary employed Donald G. Fisher (Fisher)⁴, a mining engineer, to investigate and report

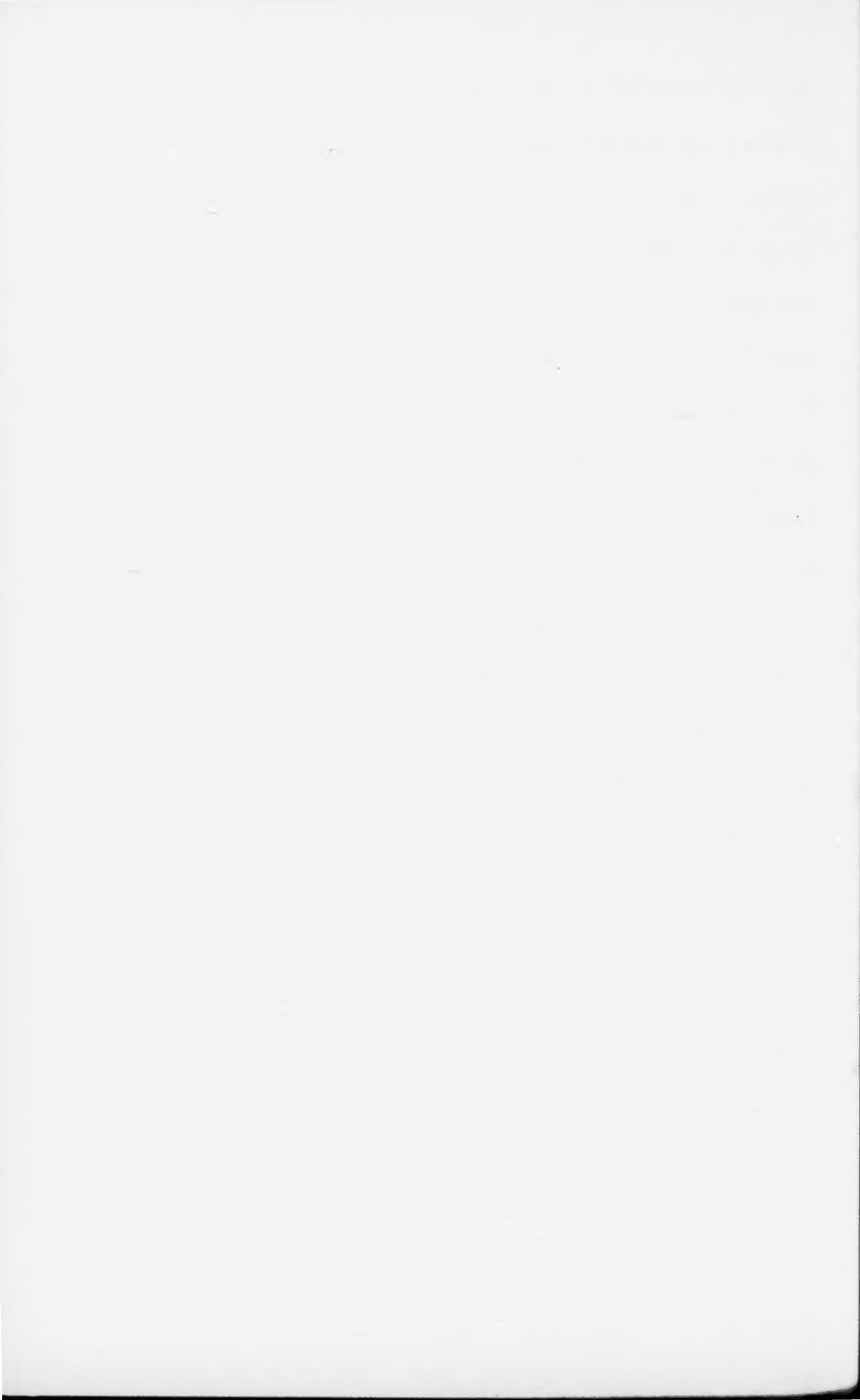
4. Fisher had been previously employed by the Secretary in connection with other contests of sand and gravel claims within the Las Vegas vicinity.



on the validity of the Charlestone claims. Fisher gathered hearsay information from competing sand and gravel operators in the area and made a visual examination of the claims in 1965, some ten years after the crucial date of July 23, 1955. Based upon his investigation, Fisher opined that all of the Charlestone claims were invalid for want of a discovery. The Secretary then used the Fisher report as a basis for the contest proceedings.

Administrative Proceedings:

Fisher was the Secretary's sole witness and his testimony comprised the only evidence in support of the contest. Fisher testified to the effect that his opinion was based upon information gained as a result of visual examination of apparent extractions from each of the claims in 1965 and again in 1969; review of all mineral reports, as well as the Hill report; and interviews with local sand and



gravel dealers, including the present owners and the past operators of the claims. Further, he testified that his opinion was also based upon his familiarity with the Las Vegas area, where he had previously been employed by the Government in making validity determinations and market studies in mining contest cases. Fisher, using his version of the test of discovery, opined that "this was a very sporadic operation . . . [It] didn't appear to be an operation that could sustain a continuous operation over the years" and the claims were invalid for want of discovery. In his opinion, the crucial factors in the invalidity of the claims were the excessive distance of the claims from a market and the lack of washing facilities.

To rebut Fisher's testimony, Charlestone produced the deposition testimony of Hill. Hill's testimony

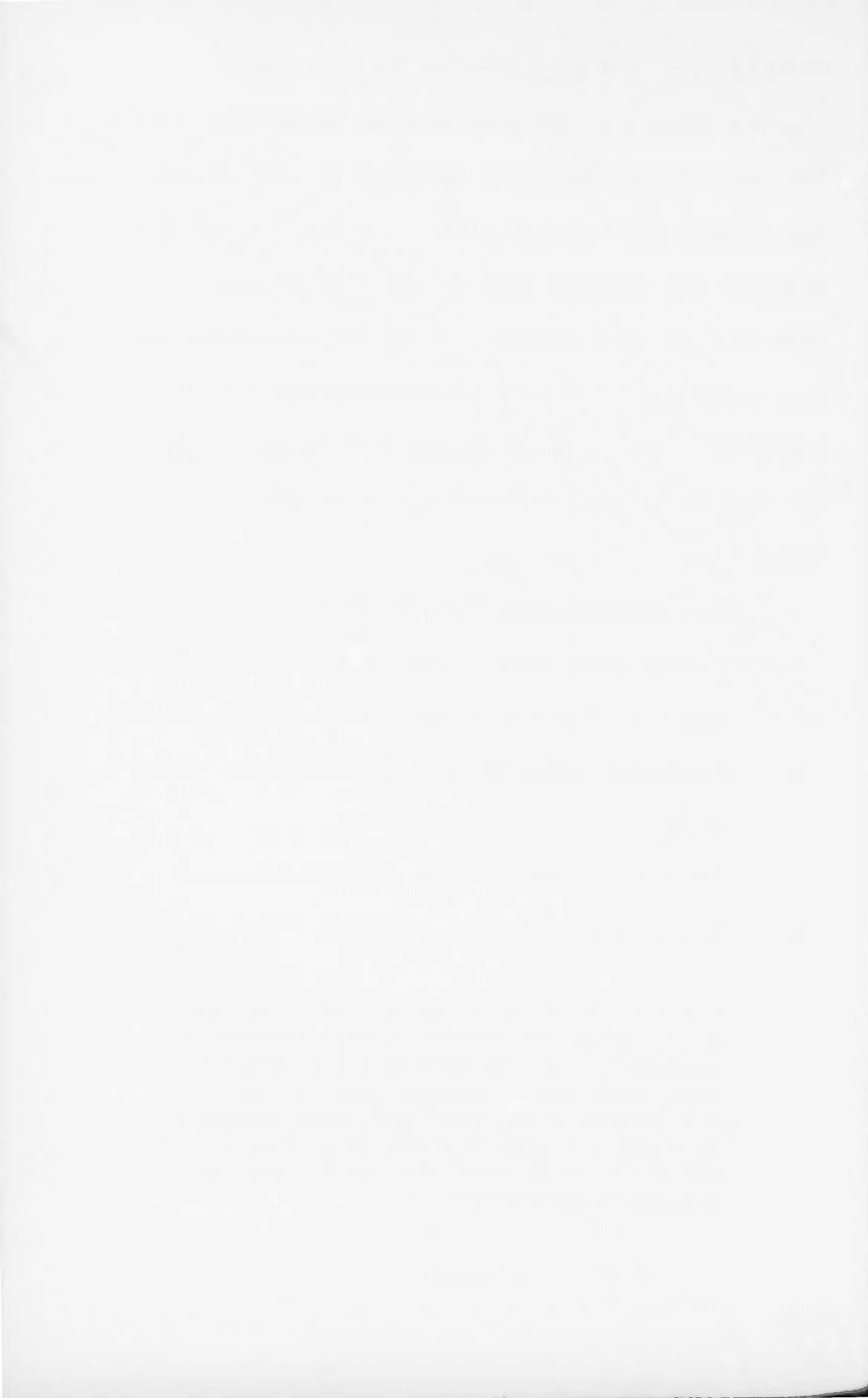


reaffirmed the conclusion in his 1956 report that all of the claims were valid. He testified that his opinion of validity was based upon a personal inspection of the claims, an investigation of the actual history of the operation of the claims, and his knowledge of the marketability of the product resulting from the thorough study he had made in conjunction with Mr. Lovejoy.

Charlestone buttressed Hill's conclusions with the eyewitness testimony of several workers who had been employed at the extraction operations by Southern and Brawner.⁵

The decisions of the Administrative Law Judge and the Board reflect that each

5. The record establishes actual sales from the claim sites and constitutes an even stronger showing of marketability than was made in either *Melluzzo v. Morton*, 531 F.2d 860 (9th Cir. 1976), or *Virrué*, *supra*. In those cases, this Court, notwithstanding a total absence of sales from the claim sites, reversed decisions of the Secretary that certain sand and gravel claims were invalid.



gave substantial weight to Fisher's testimony. At the conclusion of the hearing, the Administrative Law Judge found only two of the 22 claims to be valid. On administrative review, the Board, placing even more credence on Fisher's opinion, found only one of the claims to be valid. Charlestone ultimately and successfully sought review of the latter decision in the District Court.

Discussion and Disposition:

Issue 1:

[1] We conclude that the Board's exclusion of validity of Charlestone's claims, except as to Claim 10, is not supported by substantial evidence.

Our conclusion is, first, guided by the course set in *Walker v. Mathews*, 546 F.2d 814, 818 (9th Cir. 1976):

"Substantial evidence means that a finding is supported by 'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to



support a conclusion." (Richardson v. Perales (1971) 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.ED.2d 842). In applying the substantial evidence test we are obligated to look at the record as a whole [6] and not merely at the evidence tending to support a finding."

Footnote 6 reads:

"See, Day v. Weinberger (9th Cir. 1975) 522 F.2d 1154, 1156 ('But in determining whether there is substantial evidence to support the examiner's finding a reviewing court must consider both evidence that supports, and evidence that detracts from, the examiner's conclusion. We cannot affirm the examiner's conclusion simply by isolating a specific quantum of supporting evidence'); Davis, 4 Administrative Law Treatise §29.03 (1958) ('... Evidence which may be logically substantial in isolation may be deprived of much of its character or its claim to credibility when considered with other evidence.');

and Universal Camera Corp v. N.L.R.B. (1951) 340 U.S. 474, 487-88, 71 S.Ct. 456, 95 L.Ed. 456."

Secondly, "opinions not supported by facts, and which are contrary to the physical facts and do violence to scientific principle or reason, are robbed of all probative value." Weinberg v.



Northern Pac. Ry. Co., 150 F.2d 645, 651 (8th Cir. 1945). See Anderson v. Knox, 297 F.2d 702, 719-20 (9th Cir. 1961); United States v. Honolulu Plantation Co., 182 F.2d 172, 178 & n.15 (9th Cir. 1950); and United States v. 102.93 Acres of Land, Etc., 154 F.Supp. 258 (E.D.N.Y.1957), aff'd sub nom. United States v. Fox, 257 F.2d 805 (2d Cir. 1958).

Finally, this Court has in the past refused to credit the testimony of Government witnesses on facts similar to those in the case at bar. In Verrue, supra, this Court affirmed the District Court's reversal of the Secretary's decision invalidating a sand and gravel mining claim for lack of discovery of a valuable mineral deposit. In reaching this conclusion, the Court noted that the crucial issue was marketability and that the testimony of the three Government witnesses "sheds no light on that issue"



because none of them had been in the area of the mining claim during the crucial period "nor did any one of them have personal knowledge of the sand and gravel market during that time." id. at 1204.

Fisher's opinion, on which the Secretary exclusively relies, neither avoids the inadequacies noted in Verrue, supra, nor is it supported by the other facts in the record. It was based upon an investigation begun more than ten years after the close of the crucial period. Although he stated he was familiar with the Las Vegas area, there was no indication that he was familiar with that area during the crucial period. In addition, his opinion was not based on personal knowledge of the sand and gravel market during that period. Rather, he gleaned his information solely from a visual inspection of the terrain, a review of reports and interviews with others, all conducted more than ten



years after the crucial period. More importantly, his opinion was flatly contradicted by the Hill report which was based upon an investigation completed within one year of the crucial period and also by direct evidence of marketability supplied by persons who had actually witnessed substantial recoveries from the claims up and down the valley or wash. In light of these factors, we must conclude that the Board improperly credited Fisher's unfounded opinion of nonvalidity.

Issue 2-(a):

A discovery of valuable sand and gravel deposits on Claims 1 through 22, containing workable deposits of sand and gravel of like character and quality with the material in Claim 10, is clearly established by the record.

Issue 2-(b):

[2] The marketability of the pre-July 23, 1955 extractions can be tested by



reason of: (1) Accessibility to the claims; (2) Bona fides of the operators in developing the claims; (3) Existence of market demand within reasonable proximity to the claims; and (4) Actual participation in the market. See *clear Gravel Enterprises*, supra at 181.⁶

The relevant evidence in the record established that:

(1) Accessibility of Charleston's Claims 1 through 22 was readily available. The area of the wash was not remote but, to the contrary, readily available to major public roads;

6. Contrast with the holding in *Humboldt Placer Mining Company v. Secretary*, 549 F.2d at 625 (9th Cir. 1977), where this Court reemphasized its holding in *Verrue*, supra, that "positive evidence in the record of marketability" was not offset by evidence of the lack of sales of material and the availability of comparable material from other sources.²

Footnote 2 reads: "in *Melluzzo v. Morton*, 534 F.2d 860, 863 (9th Cir. 1976), we construed *Verrue* as holding that lack or insubstantiality of sales of material from the claims in question is relevant to the question of marketability. It is not, however, conclusvie proof of lack of value. The inference to that effect, when all evidence is considered, can be found to have been overcome by evidence of marketability."

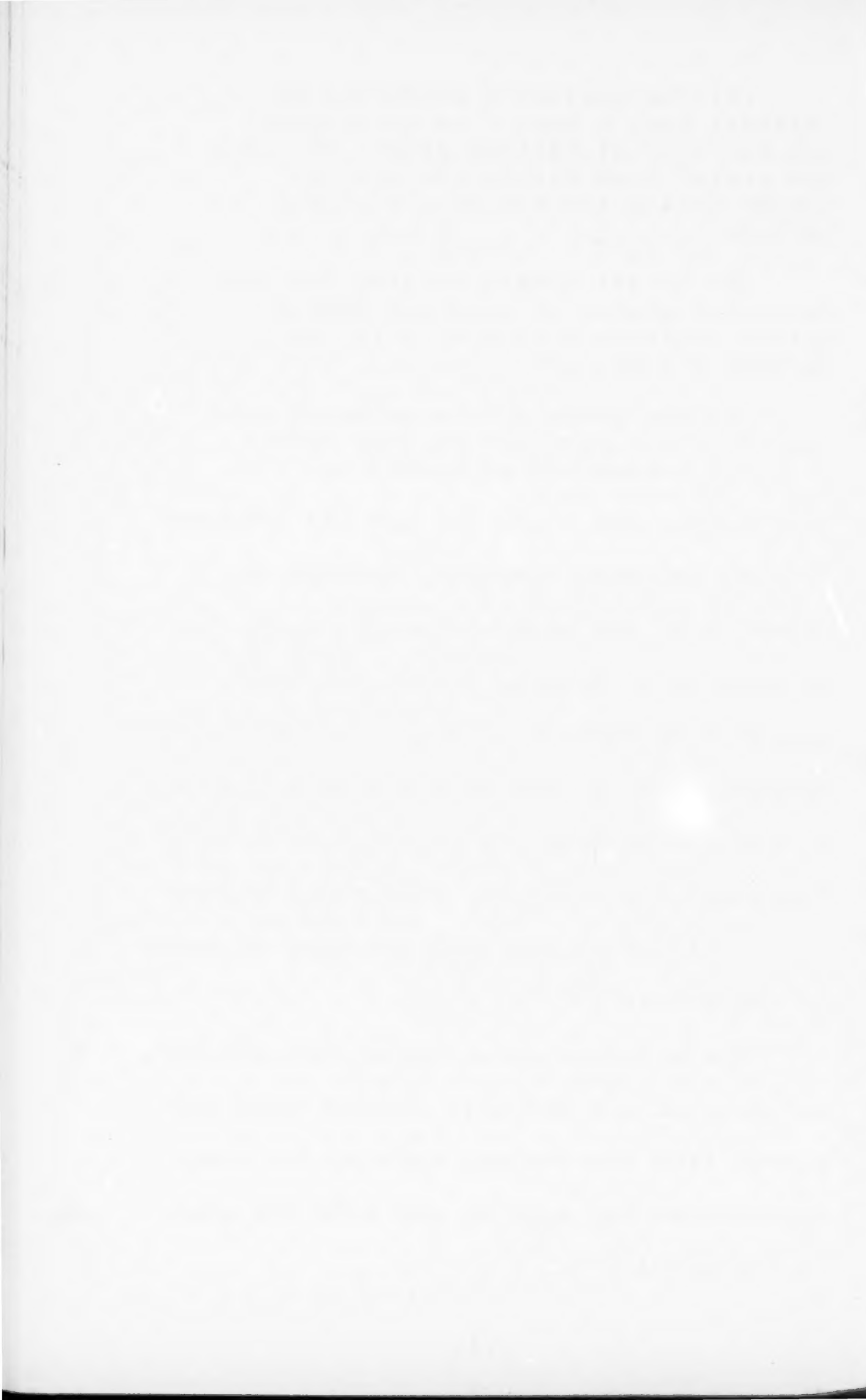
(2) Charlestone's predecessors in interest made a bona fide development and recovery of various grades of sand and gravel from within the several claims during the pre-July 23, 1955 period;

(3) Market demand existed for the extracted grades of sand and gravel within reasonable proximity to the various claims; and

(4) The predecessors actually sold the recovered material in that market.
The evaluation as to whether

Charlestone met tests (3) and (4) deserves further comment. Fisher's opinion of nonvalidity was based primarily upon: (a) An absence of washing water; (b) The sporadic operations of Southern and Brawner; and (c) The prohibitive distance of the claims from the market. We are convinced that each of those reservations was nullified by the only relevant evidence in the record.

The evidence established that Southern and Brawner did actually recover sand and gravel from the claims, transported those extractions for washing and sold the same on the market.



[3] The seemingly sporadic operations by Southern and Brawner were a mirror of the building and construction industry in the Las Vegas area during and shortly after World War II. Continuous operation of a placer mining claim is not a per se requisite to proving the validity of that claim. Cessation of operation of any economic enterprise may be caused by innumerable factors totally beyond the bona fide intentions of the operator. Reason dictates that periodic cessation of operation of a placer mining claim, short of an intentional abandonment of the claim, need not defeat ultimate proof of validity.

Since a total absence of operation does not preclude a finding of validity (Verrue, supra), it follows that sporadic operation does not preclude a finding for validity. The Secretary does not contend there was a pre-July 23, 1955 abandonment of the claims by Brawner. In fact, as of



July 23, 1955, Brawner was engaged in the profitable extraction of sand and gravel from the various claims.

The Fisher postulate of an excessive distance of the claims from the market is meaningless. Some competitors in the sand and gravel business are next door to a construction project; yet a distant competitor underbids and successfully competes with the next door neighbor. The inescapable fact is that market demand supported the recovery and sale of material from the claims.

[4] The prudent person test has enough flexibility to allow a sand and gravel business operator to undertake an apparently marginal enterprise if it has a reasonable possibility of success. Relying on Fisher's opinion, the Secretary deemed Brawner to have been a foolhardy operator; yet in many circles, pre-July 23, 1955 Las Vegas area entrepreneurs would have been deemed astute.



Finally, we conclude that the District Court's finding that "at least the claims numbered 1 through 16 have been proved valid" is not clearly erroneous. Fed.R.Civ.P. 52(a).

[5-7] Furthermore we agree with the District Court's conclusion that Charlestone must be permitted access to Claim 22 in order to utilize the water recovered from the well in the operation of the other valid claims. However, we reach our conclusion upon a rationale other than that relied upon by the District Court.

It is agreed that the Murphy location notices were lawfully filed under the Acts of Congress. Each of the location notices, covering Claims 1 through 22, described a "piece of mineral bearing ground as a Placer claim" as distinguished from a claim location of any particular mineral, either surface or underground, within that tract of ground. "A placer location is the



location in accordance with those acts [of congress] of a tract of land for the mineral bearing or other valuable deposits upon or within it that are not found in lodes or veins in rock in place." Webb v. American Asphaltum Min. Co., 157 F.203, 204 (8th Cir. 1907). See also 1 American Law of Mining §5.10 (1976).

We are staisfied that Charlestone, as Murphy's successor, had the right to appropriate and utilize as a mineral the water within any of the claims which met the above two prong test of value and success in development. It has been said that "'Mineral' is a word of general language, and not per se a term of art . . . It is not capable of a definition of universal application, but is susceptible to limitation or expansion according to the intention with which it is used in the particular . . . statute." Bumpus v. United States, 325 F.2d 264, 266 (10th Cir. 1963).



Since early times, water has been regarded as a mineral. "[T]he term 'mineral' has been held to embrace water, particularly subterranean water, irrespective of the character and quantity of salts and gases which may be in solution." 58 C.J.S. Mines & Minerals §2(7) (1948). (Footnotes omitted). Water itself may be classified as a mineral. United States v. Union Oil Co. of California, 549 F.2d 1271, 1273 (9th Cir. 1977).

The pertinent Acts of Congress which allow a prospector to enter and patent placer claims for valuable minerals do not expressly define water as a non-mineral. In Union Oil Co., supra at 1273 this Court hazards that "Congress was not aware of geothermal power when it enacted the Stock-Raising Homestead Act in 1916; it had no specific intention either to reserve geothermal resources or to pass title to



[the Stock-Raisers]." It is common knowledge that the successful recovery of many "hard" minerals from the earth and the utilization of the soft mineral of water therewith go hand in hand. American Law of Mining §2.71 (1976). Therefore, it would be incongruous for us to hazard that Congress was not aware of the necessary glove of water for the hand of mining and therefrom Congress impliedly intended to reserve water from those minerals allowed to be located and recovered. In any event we decline to do so.

The limitation in 30 U.S.C. §611 on the location of claims for common varieties of certain named minerals does not apply to water. In fact, the express language of §611 exempts from its operation "some other mineral occurring in or in association with such deposit." Therefore, it is of no importance that the discovery of water within Claim 22 occurred after July 23, 1955.



The water recovered from the source under Claim 22⁷ undeniably has an intrinsic value in the desert area. There is by the nature of Charlestone's operations no evidence of a profitable market of the water per se for either domestic or irrigation uses. Nevertheless the only relevant evidence in the record demonstrates the existence of a profitable market of the water as a washing agent for the sand and gravel recovered from the valid claims. Although unwashed sand and gravel has a limited market, good quality sand and gravel in combination with water draws a premium market.

We are satisfied that Charlestone has shown a profitable market for the water recovered upon Claim 22 and its claim for the extraction of that water is valid.

7. This District Court noted that the source of water under Claim 22 was present on the date of Murphy's notice of location.

The judgment of the District Court entered on November 8, 1974, vacating the decision of the Board dated January 18, 1973 and remanding the cause to the Secretary is affirmed, and the cause is remanded to the District Court for further order of remand to the Secretary consistent with the foregoing.

AFFIRMED AND REMANDED.



UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 14953

EVERETT FOSTER, ET AL., APPELLANTS

V.

FRED A. SEATON, SECRETARY OF THE INTERIOR,
APPELLEE

Appeal from the United States District
Court for the District of Columbia

Decided October 22, 1959

Mr. Leo A. Huard, with whom Messrs.
Ralph E. Becker and F. Murray Callahan were
on the brief, for appellants.

Mr. Claron C. Spencer, Attorney,
Department of Justice, with whom Mr. S.
Billingsley Hill, Attorney, Department of
Justice, was on the brief, for appellee.
Mr. Roger P. Marquis, Attorney, Department
of Justice, also entered an appearance for
appellee.

Before PRETTYMAN, Chief Judge, and
BAZELON and BURGER, Circuit Judges.



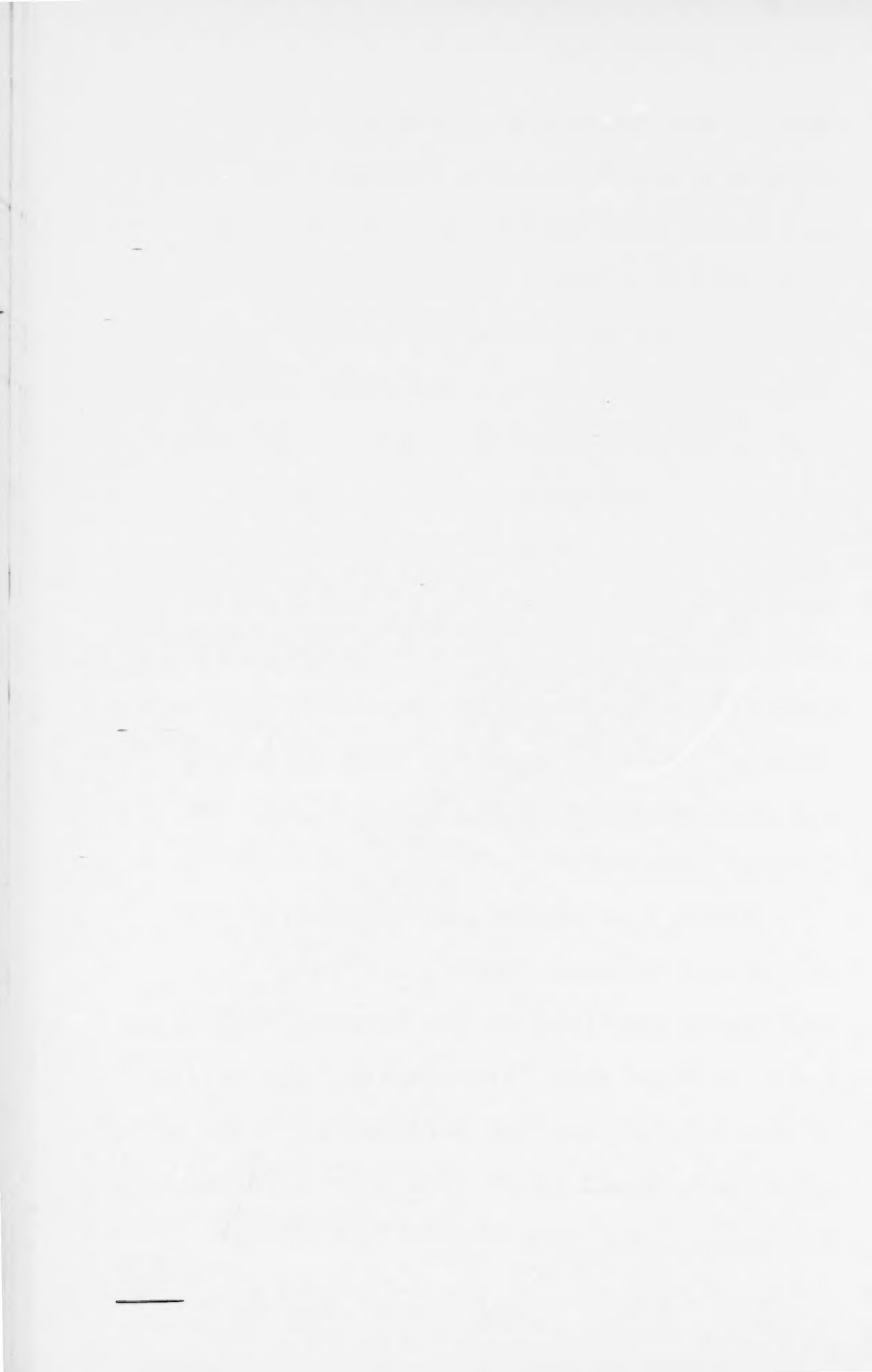
PER CURIAM: This case relates to Appellants' claims under provisions of the mining laws which authorize "occupation and purchase" of Government lands containing "valuable mineral deposits." Rev. Stat. §2319, 2325, 2329 (1875), 30 U.S.C. §22, 29, 35 (1952). The Department of the Interior instituted proceedings contesting the claims on the ground that the allegedly "valuable mineral deposits" of sand and gravel, located thirteen miles from the center of Las Vegas, Nevada, were insufficient, inter alia, in quantity, quality and accessibility to a market to constitute a valid discovery. The hearing officer rendered a decision favorable to appellants, but it was reversed by the Director of the Bureau of Land Management upon an appeal by rival claimants who had intervened to assert an interest in the land under the Small Tract Act, 68 Stat. 239 (1954), 43 U.S.C. §682(a) (Supp. v.

1958). The Secretary of the Interior sustained the Director's ruling.

Appellants then instituted this suit in the District Court under the Administrative Procedure Act to review the Secretary's decision. On cross motions, the District Court granted a summary judgement in favor of appellee and this appeal followed.

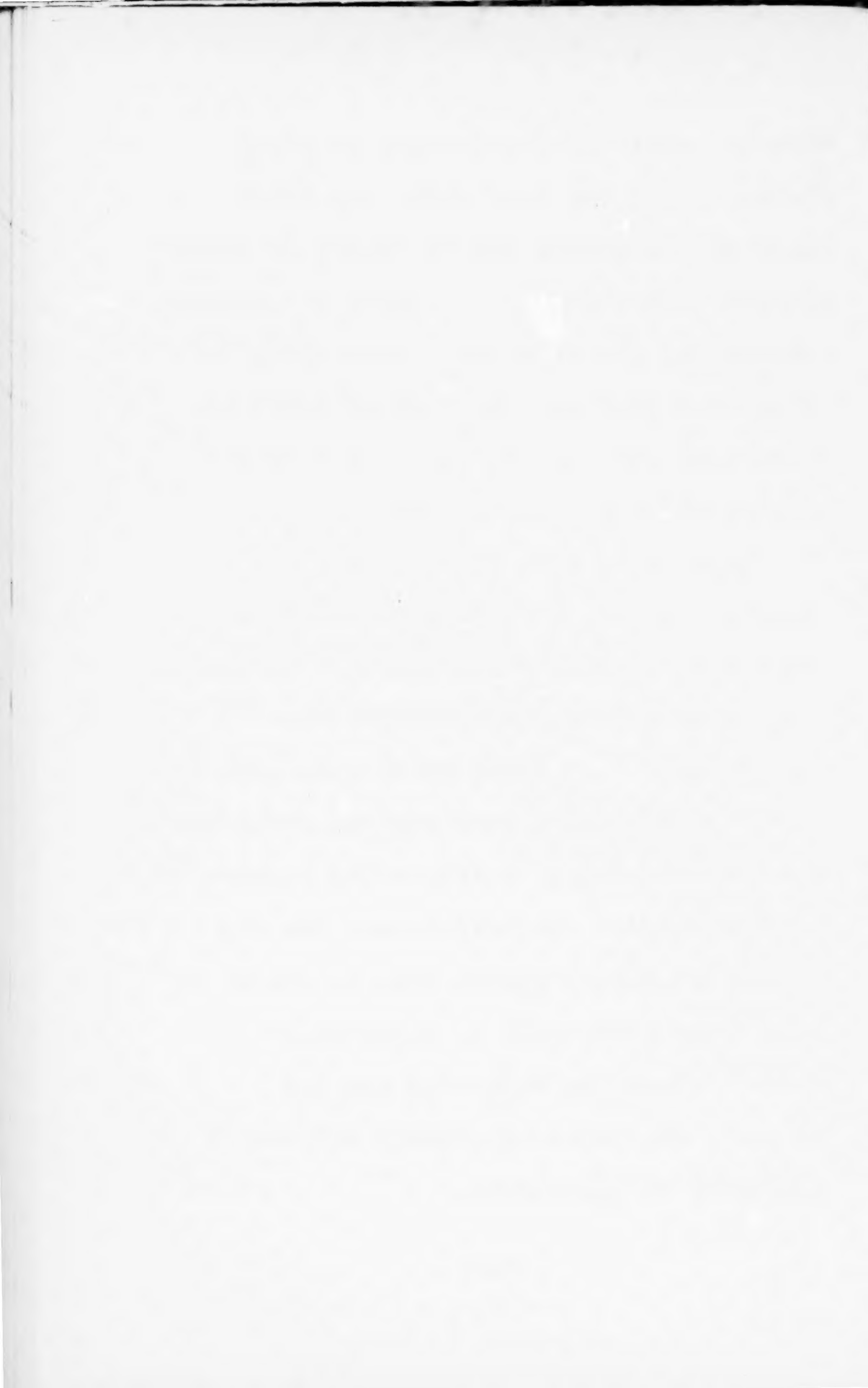
Appellants have raised a number of points relating to errors of procedure and statutory interpretation allegedly committed throughout the administrative process. We have examined them carefully and find no merit in the contentions. We discuss them briefly.

Appellants claim that they were prejudiced because intervenors were improperly admitted to the hearing, and that, without such intervention, the ruling of the initial hearing examiner in favor of appellants would never have been appealed and hence never reversed.¹ It is clear,



however, that the intervenors as rival claimants for the land under the Small Tract Act, allowing the Secretary to lease or sell vacant Government lands for certain residential and commercial uses, were interested parties. We find no basis for disturbing the administrative action with respect to this intervention.

Appellants also contend that the hearing examiner erroneously denied their request to examine a confidential document from which a Government witness was testifying. The record shows that upon the witness' claim of a governmental privilege appellants' counsel withdrew his request for disclosure. Thereafter the hearing officer expressly stated that he would, if again requested, rule in appellants' favor. Since the objection was not revived, the point is plainly not now available to appellants.



Appellants' third allegation of error is that the Secretary failed to hold the Government to the standard of proof required by the Administrative Procedure Act, which states that "the proponent of a rule or order shall have the burden of proof." 60 Stat. 241 (1946), 5 U.S.C. §1006 (1952). The Secretary ruled that, when the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case, and that the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid.² The short answer to appellants' objection is that they, and not the Government, are the true proponents of a rule or order; namely, a ruling that they have complied with the applicable mining

2. This is the standard which the Department of Interior has applied for a number of years. See *United States v. Strauss*, 59 L.D. 129 (1945).

laws. One who has located a claim upon the public domain has, prior to the discovery of valuable minerals, only "taken the initial steps in seeking a gratuity from the Government." *Ickes v. Underwood*, 78 U.S. App. D.C. 396, 399, 141 F.2d 546, 549, cert. denied, 323 U.S. 713 (1944); Rev. Stat. 2319 (1875), 30 U.S.C. §23 (1952). Until he has fully met the statutory requirements, title to the land remains in the United States. *Teller v. United States*, 113 Fed. 273, 281 (8th Cir. 1901). Were the rule otherwise, anyone could enter upon the public domain and ultimately obtain title unless the Government understood the affirmative burden of proving that no valuable deposit existed. We do not think that Congress intended to place this burden on the Secretary.

Appellants' principal assignment of error is that the Secretary misinterpreted

5

the statute by requiring a demonstration of present value. They earnestly contend that their claim can also be sustained on the basis of prospective market value.

The statute says simply that the mineral deposit must be "valuable." Rev. Stat. §2319, 30 U.S.C. §22. Where the mineral in question is of limited occurrence, the Department, with judicial approval, has long adhered to the definition of value laid down in *Castle v. Womble*, 19 I.D. 455, 457 (1894):

Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

With respect to widespread non-metalli[c] minerals such as sand and gravel, however, the Department has stressed the additional requirement of present marketability in order to prevent



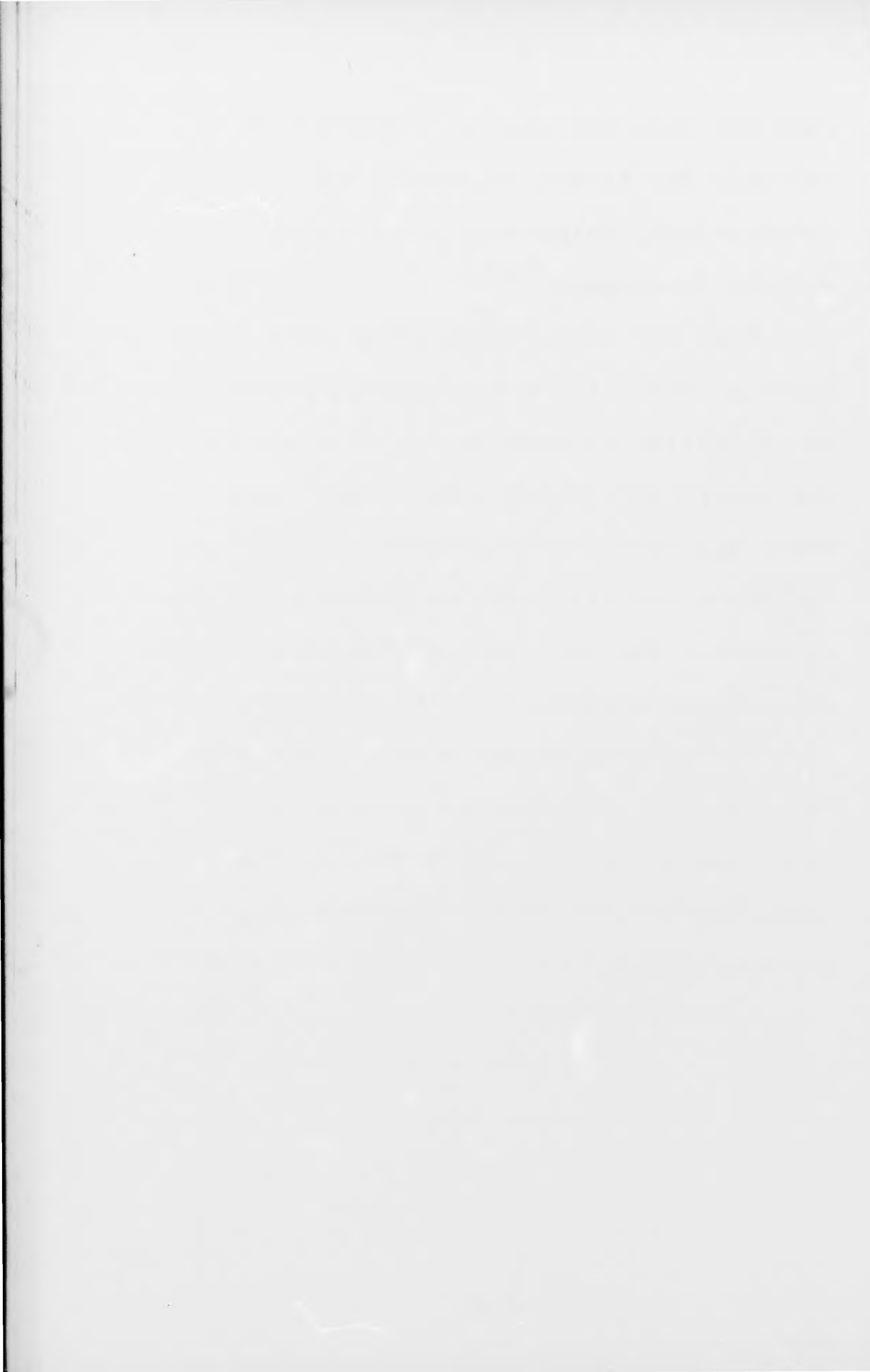
the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining. Thus, such a "mineral locator or applicant, to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit." Layman v. Ellis, 54 I.D. 294, 296 (1933), emphasis supplied. See also Estate of Victor E. Hanny, 63 I.D. 369, 370-72 (1956). Particularly in view of the circumstances of this case, we find no basis for disturbing the Secretary's ruling. The Government's expert witness testified that Las Vegas Valley is almost entirely composed of sand and gravel of similar grade and quality. To allow such land to be removed from the public domain because unforeseeable developments might



some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development.

Thus the case really comes down to a question whether the Secretary's finding was supported by substantial evidence on the record as a whole. We think it was. There may have been substantial evidence the other way also, but we do not weigh the evidence. The testimony of Shafer and his colleagues in support of the Government was clearly substantial and most certainly was not destroyed. He was an experienced man, knew sand and gravel, knew the Las Vegas area, and his testimony was clear, succinct and convincing.

Affirmed.



UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|----------------------|---|-----------------|
| ROBERT L. MENDENHALL |) | |
| |) | No. 83-1751 |
| Appellant, |) | |
| |) | D.C. No. |
| vs. |) | CV-R-80-146-ECR |
| |) | |
| UNITED STATES OF |) | MEMORANDUM* |
| AMERICA, and UNITED |) | |
| STATES DEPARTMENT OF |) | |
| INTERIOR, et al., |) | |
| |) | |
| Appellees. |) | |

Appeal from the United States District
Court for the District of Nevada
Edward C. Reed, District Judge, Presiding
Argued and Submitted: March 16, 1984

Before: TANG and PREGERSON, Circuit Judges,
and HATTER** District Judge.

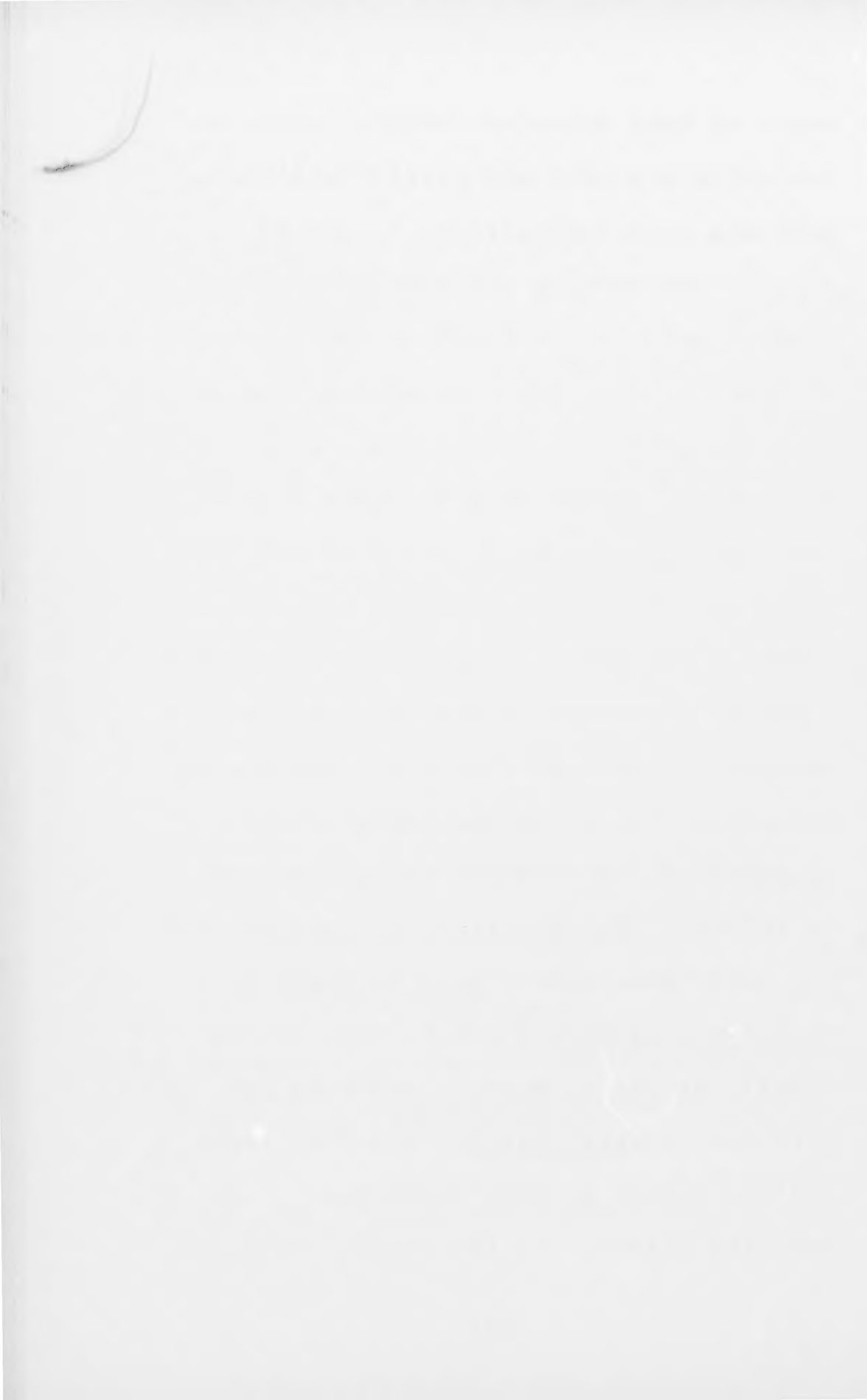
Robert L. Mendenhall appeals the
district court's affirmance of the Interior

* The panel has concluded that this appeal presents issues that do not meet this court's standards for disposition by written opinion. See 9th Cir. R. 21. Therefore, we order disposition by memorandum rather than by publication in the Federal Reporter. This memorandum may not be cited to or by the courts of this circuit.

** Hon. Terry J. Hatter, Jr., United States District Judge, Central District of California, sitting by designation.

Board of Land Appeals' (IBLA's) decision declaring his sand and gravel land claims null and void. We affirm.

In reviewing a decision of the IBLA or a Department of the Interior Hearing Officer, we consider only whether the decision was arbitrary, capricious, an abuse of discretion, or not in accordance with law. Melluzzo v. Watt, 674 F.2d 819, 820 (9th Cir. 1932); 5 U.S.C. 706 (2) (e) (1982). The proper standard for evaluating a placer discovery is whether a reasonable prospect of success exists for the mining operation, including consideration of exploration, development and present marketability. United States v. Coleman, 390 U.S. 599, 602 (1968); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335-36 (1963); Barton v. Morton, 498 F.2d 288, 291 (9th Cir.), cert. denied, 419 U.S. 1021 (1974); Castle v. Womble, 19 Pub. Lands Dec. 455 (1894). In the case of sand and



gravel claims, the discovery evaluation standard must be applied as of July 23, 1955. 30 U.S.C. 611 (1976).

The Hearing Officer's finding that Mendenhall's predecessor-in-interest, Sullivan, failed to carry his burden of showing marketability potential as of July 23, 1955 is supported by substantial evidence. The Hearing Officer found that Sullivan's "statements relating to removal of sand and gravel were couched in very general terms." The value of the claims as of July 23, 1955 was not established. Sullivan was the only witness on behalf of his own claim, and the Hearing Officer found that he "present[ed] only infirm or inconsistent recollection rather than adequate records or other reliable evidence." The Hearing Officer found that Sullivan failed to show that sand and gravel was marketed or that there was a profitable outlet for sand and gravel as of



July 23, 1955. The Hearing Officer applied the proper standard, and nothing in the record establishes discovery and marketability potential as of July 23, 1955.

After the government established a prima facie case, the burden of proving marketability rested on Sullivan. Humboldt Placer Mining co. v. Secretary of Department of Interior, 549 F.2d 622, 624 (9th Cir. 1977) (citations omitted). Because the showing was not made, the Hearing Officer's decision was proper.

AFFIRMED.

Filed: May 1, 1984
Phillip B. Winberry
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
|----------------------|---|-------------|
| ROBERT L. MENDENHALL |) | |
| Appellant, |) | No. 83-1751 |
| |) | |
| vs. |) | |
| |) | |
| UNITED STATES OF |) | O R D E R |
| AMERICA, and UNITED |) | |
| STATES DEPARTMENT |) | |
| OF INTERIOR, et al, |) | |
| |) | |
| Appellees. |) | |
| |) | |

Before: TANG and PREGERSON, Circuit Judges,
and HATTER* District Judge.

The panel as constituted above has
voted to deny the petition for rehearing.
Judges Tang and Pregerson voted to reject
the suggestion for rehearing en banc and
Judge Hatter recommended such rejection.

The full court has been advised of the
suggestion for rehearing en banc, and no
judge of the court has requested a vote on
the suggestion for rehearing en banc. Fed.
R. App. P. 35 (b).

* The Honorable Terry J. Hatter, Jr., United States
District Judge for the Central District of California,
sitting by designation.

The petition for rehearing is denied,
and the suggestion for rehearing en banc is
rejected.

Filed: June 28, 1984
Phillip B. Windberry
Clerk U. S. Court of Appeals

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

| | | |
|------------------------|---|-------------------|
| ROBERT L. MENDENHALL |) | |
| Plaintiff, |) | Civil No. |
| |) | R-80-146-ECR |
| v. |) | |
| |) | AFFIDAVIT OF |
| THE UNITED STATES OF |) | GEORGE A. KIERSCH |
| AMERICA, THE UNITED |) | |
| STATES DEPARTMENT OF |) | |
| INTERIOR, and CECIL D. |) | |
| ANDRUS, Secretary of |) | |
| the Interior and |) | |
| EDWARD F. SPANG, State |) | |
| Director of Nevada |) | |
| Bureau of Land |) | |
| Management, |) | |
| Defendant. |) | |

AFFIANT, being first duly sworn upon
oath, avows and deposes as follows:

1. That I, GEORGE A. KIERSCH, Affiant
herein, am a registered professional geolo-
gist and engineer in Arizona (1750) and in
California as geologist (928) and engineer-
ing geologist (362) with degrees of
Geological Engineer and Ph.D.
(geology/mining). My varied geological
experience over a 40-year span is mainly
relevant to engineering and mineral



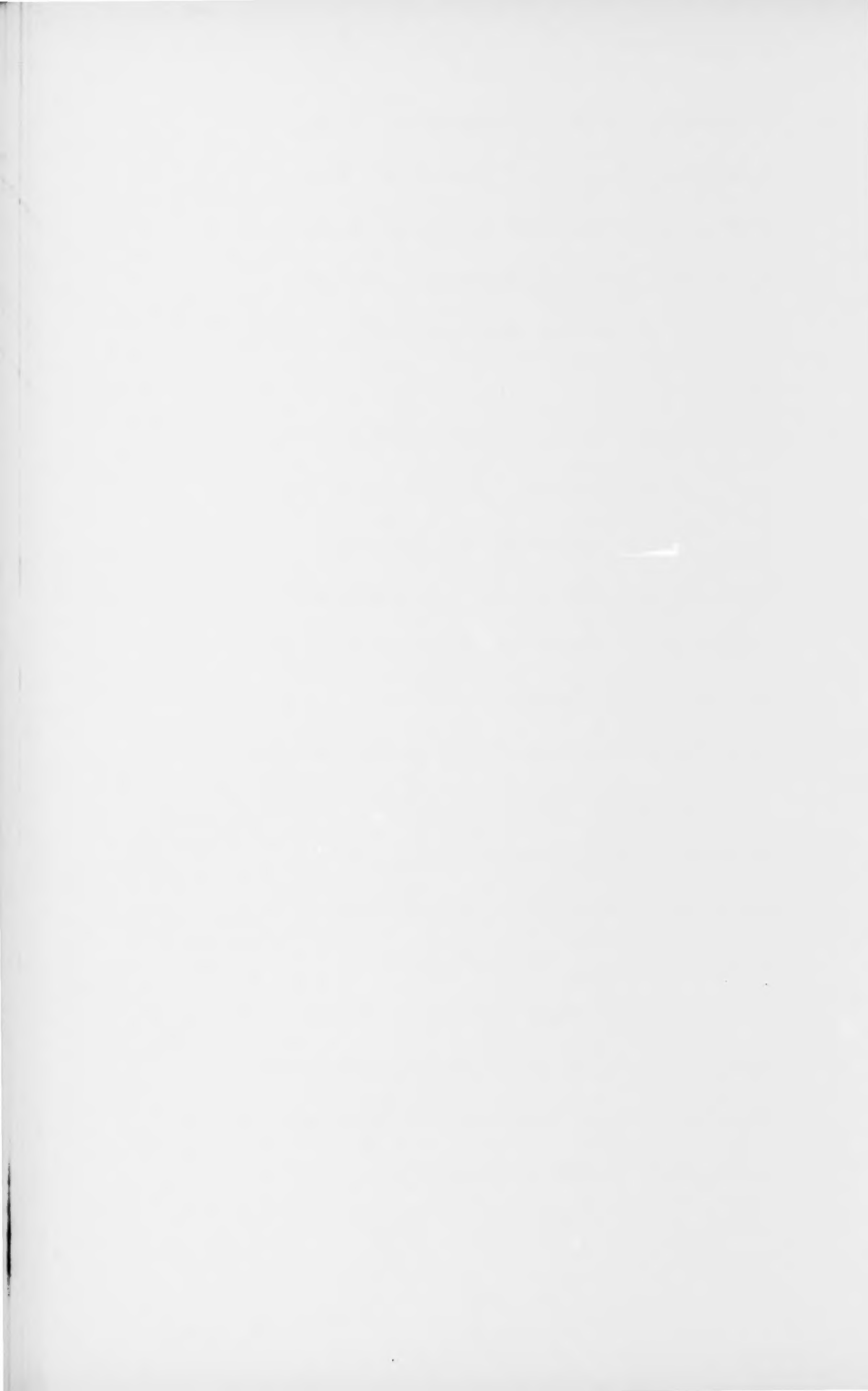
resources projects, having served as a Consultant, Manager of Exploration and/or Geologist for over 100 projects in the United States and in foreign countries. My address is: 4750 N. Camino Luz, Tucson, Arizona 85718. A specific description of my background is set forth in the attached resume as Exhibit "A".

2. That I examined the Charleston claim numbers 24/39 (involved with the lawsuit described above) and numbers 1-23 on the edge of the Spring Mountains as to their geologic setting, origin and principal characteristics of the aggregate deposits thereon, and associated features. The naturally high-quality aggregate deposits that occur throughout the claims were examined for composition and physical properties. Their use for asphalt concrete aggregate was reviewed in-depth with Mr. Robert L. Mendenhall of Las Vegas Paving Company. The following reports,

maps, and sources of information on the geology, aggregate resources and production records for the deposits were reviewed:

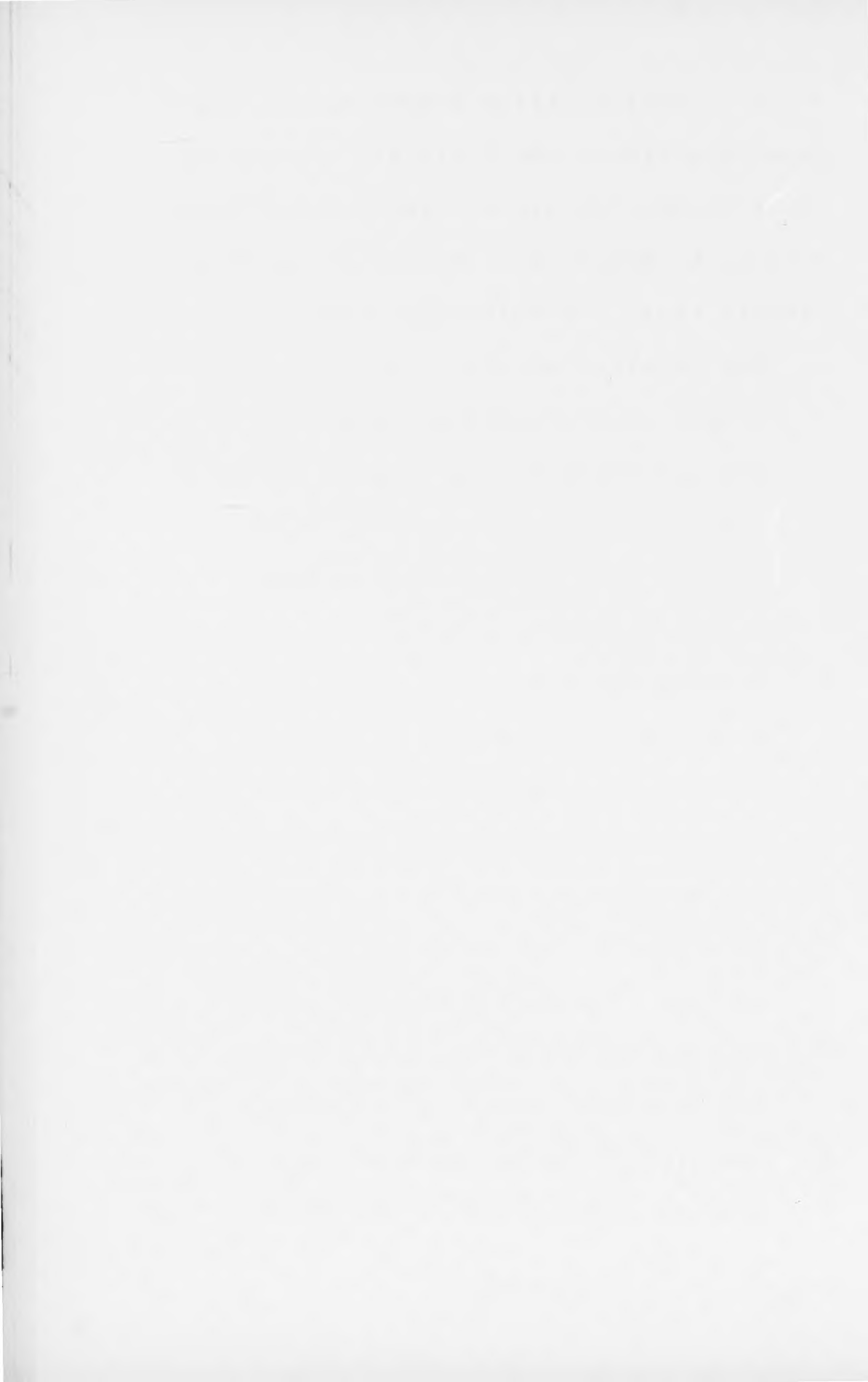
- a. Dames & Moore Consultants, 1968,
Report of investigation of sand and
gravel placer claims near Las Vegas,
Nevada for Charleston Stone
Products: By Toland, George C.
April 30, 1968.
- b. Randle Associates, 1981, Results of
tests for consumption asphalt
cement: For Las Vegas Paving Co.,
(May 20, 1981).
- c. Western Technologies, 1982, Results
of tests for consumption asphalt
cement: For Las Vegas Paving Co.
(June 24, 1982).
- d. U.S. Bureau of Land Management,
1982, Contract agreement for sale of
sand/gravel (Base Course) to Gilbert
Development Corp. (January 13,
1982).

- e. Longwell, C.R., Pampeyan, E.H.,
Bousyen, Ben, and Roberts, R.J.,
1965, Geology and mineral deposits
of Clark County Nevada: Nevada
Bureau of Mines Bulletin 62, 177p,
maps.
- f. Burchfeld, B.C., Fleck, R.J., Secor,
D.T., Vincelette, R.R. - and Davis,
G.A. 1974, Geology of Spring
Mountains, Nevada: Geological
Society of America Bulletin, Vol.
85, P. 1013-1022.
- g. Las Vegas Paving Co., 1982, Summary
of aggregate production July 1979 -
August, 1982 (August 23, 1982).
- h. Maps of Charleston Stone/Sullivan
Claims (No. 1-23 and 24/39).
- i. Topographic maps of Corn Creek
Springs and Blue Diamond quadrangles
Nevada: U.S. Geological Survey
1:62,500, 1952 edition.



3. That I, after examining the aggregate deposits in the field and discussing their production history and service record with R. L. Mendenhall, Plaintiff in this lawsuit, have the following observations:

- a. The physical characteristics and origin of the aggregate deposits on the Las Vegas Paving Company Claims (24/39) are similar to and inter-related with the Charleston Stone Claims (1-23).
- b. The aggregate deposits occur within a narrow valley carved in the steeply dipping Goodspring Dolomite beds (Spring Mountains) and continue eastward as a zone in the alluvial materials at the mouth of the canyon. The Spring Mountains are broadly folded and highly faulted. The Keystone thrust fault, a major feature of the Spring Mountains, is located immediately to the south of



the canyon where Claims 1 through 9 are located.. The deformation of the bedrock by the Keystone thrust actions have contributed to the widespread faulting and fracturing of the dolomite/limestone beds in the vicinity of the canyon. Consequently, when these beds deteriorate and are broken down by erosion and weathering processes, small sharp to angular rock fragments are formed -- largely under 1-inch in size.

Normal fluvial processes have distributed the varied-sized dolomite/limestone rock fragments along the canyon and throughout a limited area beyond the canyon's mouth and edge of the mountain slopes.

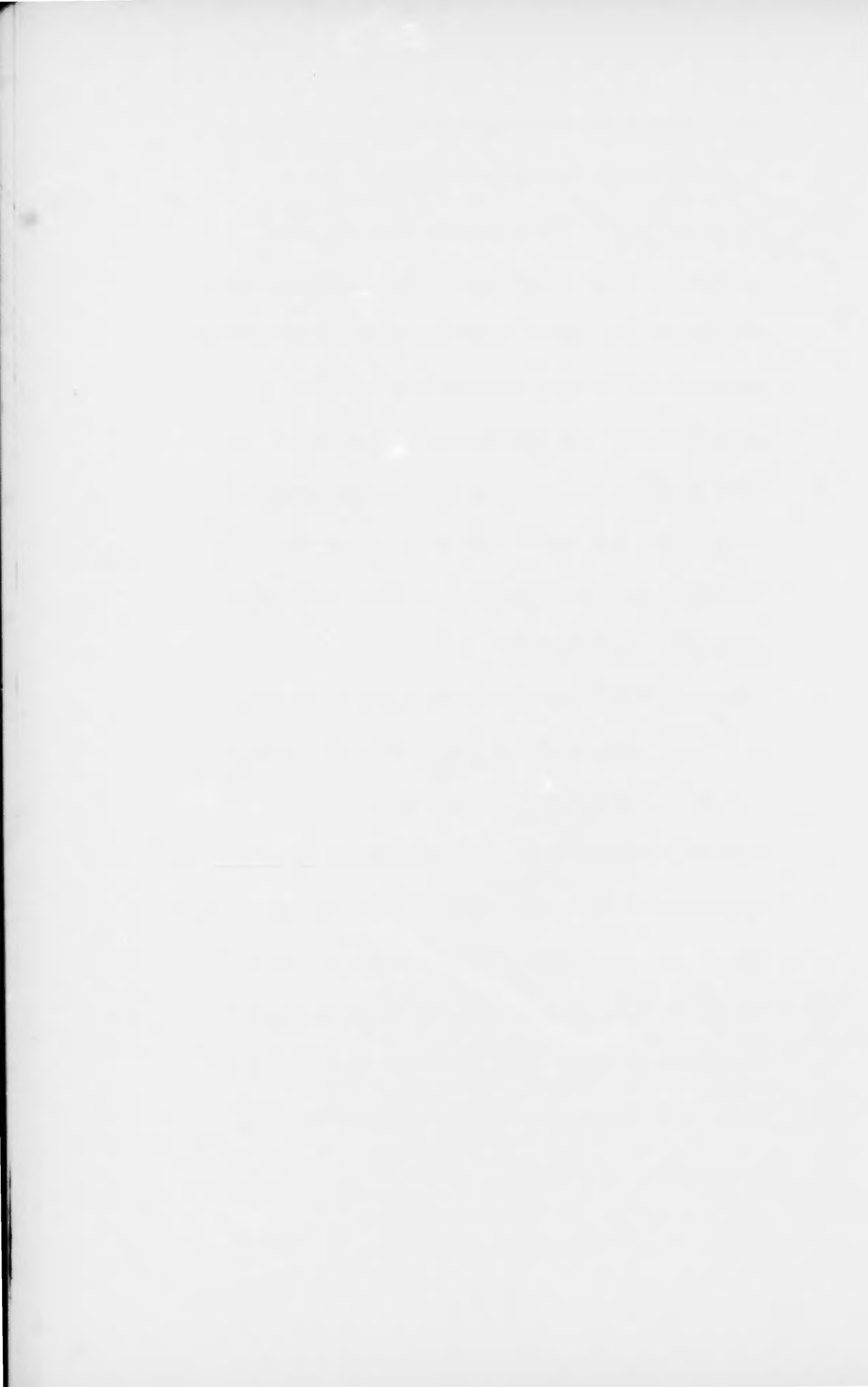
- c. The naturally occurring aggregate deposit throughout the area of Claims 24/39 and the Earlier Claims



10 to 23 consists of angular broken pieces of limestone rock with only minor rounding that are predominantly of well-graded sizes under 1-inch. The clean aggregate with only minor silt content consists of many-sided (6-8) rock fragments. Their ideal shapes allow the individual pieces of aggregate to knit and chink more closely together than a manufactured aggregate..

- d. The zone of naturally occurring aggregate is up to 15 feet thick in some parts of the Claims (24/39). The aggregate deposit is normally overlain by a thin, near-surface cap or zone of caliche-bearing sand/gravel, 3 to 6 feet thick. Recent geologic activity (regional uplift) has caused the intermittent water runoff from the canyon slopes to downcut through the zone of

- caliche cap throughout the approximate area of Claims 10 through 16. This downcutting has exposed the high-quality aggregate deposit in this sector and therefore essentially no stripping of overburden is necessary for mining.
- e. The angular, well-graded aggregate requires no washing and no crushing to meet specifications for use as asphalt concrete.
 - f. The natural gradation sizes of the pit-run aggregate fall within the range of asphalt concrete specifications. Consequently, only screening of the aggregate is needed to provide a balanced product for asphalt concrete.. An occasional block and piece greater than 1-inch in size is wasted by the screening process.

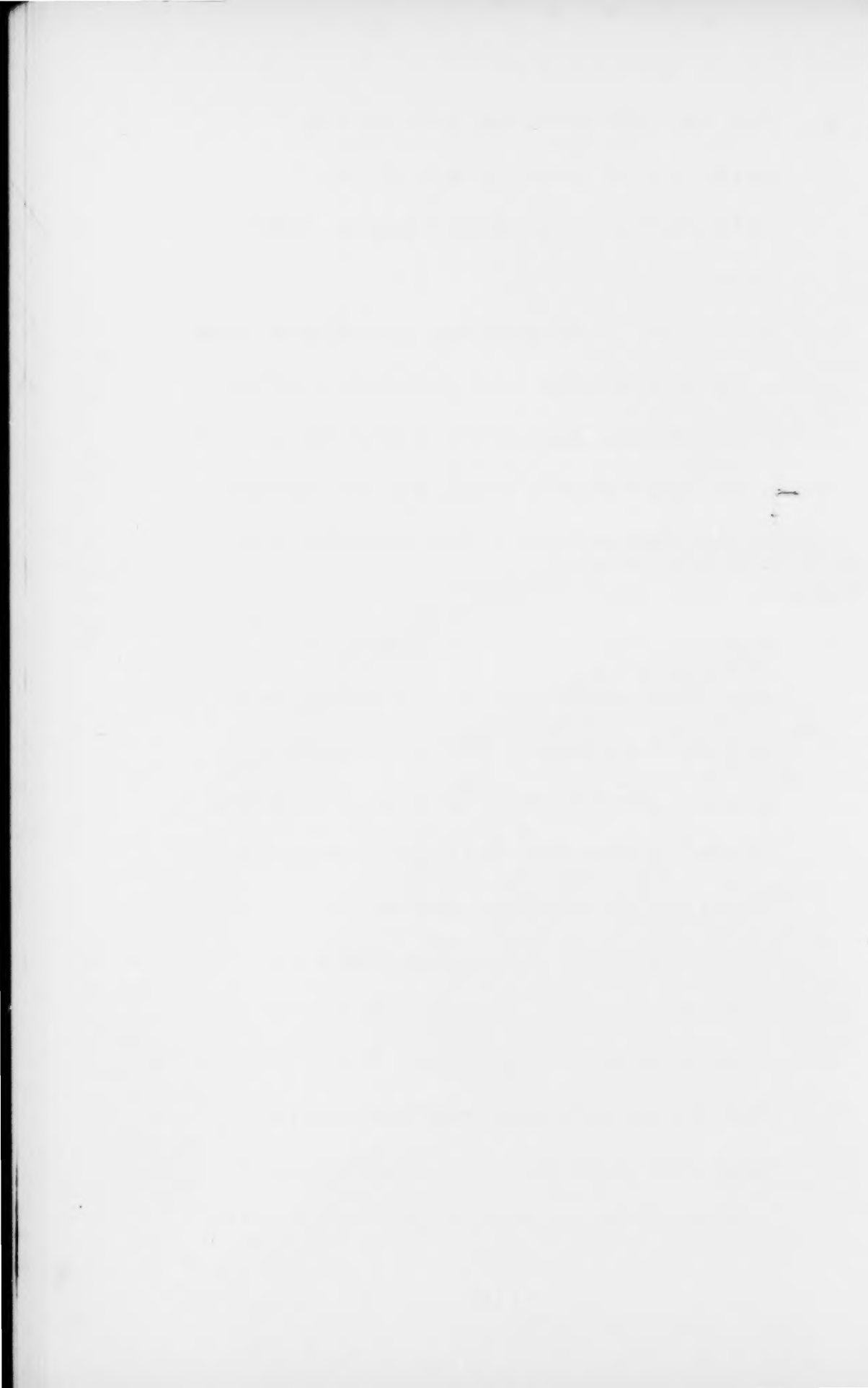


g. The caliche-bearing overburden material of lower-quality is satisfactory for Base Course (ABC) uses.

4. That I determined there are some physical properties and qualities which make the unique aggregate deposits of Las Vegas Paving Company (No. 24/39) specially useful in the industry for asphalt concrete, such as:

a. The natural occurring aggregate deposits on Claims 24/39 are clean and well-graded. The screened product meets grading specifications directly and the pit-run aggregate requires no washing and no crushing. Furthermore, there is almost no waste product of oversize rock pieces.

b. The dolomite/limestone aggregate requires considerably less asphalt consumption to meet asphalt concrete



standards than other aggregates in the region. This aggregate requires only 3.5 to 3.8% asphalt binder while the normal aggregate from this region requires 5% asphalt binder to meet standards. Consequently the Las Vegas Paving Company aggregate saves some 20 percent in asphalt costs for concrete mix. (For every 1% below the 5% normal there is a \$1.80/ton saving).

- c. The specific gravity of the pit-run aggregate averages 5 to 10 pounds heavier, at 161 pounds per volume unit, than the normal Las Vegas region aggregate at 149 pounds/volume unit. This characteristic is due to the natural angular shapes of the rock fragments which allow the close chinking and locking of grains in a mixture. This unique property of the

naturally occurring aggregate is superior to the grain locking of a manufactured aggregate.

- d. The well-graded natural occurrence of the aggregate -- requiring no crushing -- reduces production cost some \$0.50/ton.
- e. The several special and unique characteristics of the aggregate deposits combine for a very high-quality product at much lower overall costs for the production of asphalt concrete -- about \$3.20/ton below the costs for a normal gravelly material in the Las Vegas region.

5. That therefore, in my judgement, the deposit of naturally occurring, high-quality aggregate throughout the Charleston 24/39 placer mining claims is a valuable mineral deposit which possesses properties giving it distinct and special values for

which a long-term and expanding asphalt concrete market exists in the Las Vegas area for the foreseeable future.

FURTHER, Affiant sayeth not.

George A. Kiersch
GEORGE A. KIERSCH

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On this 31st day of August, 1982, personally appeared before me, the undersigned officer, George A. Kiersch, who acknowledged the above instrument.

Donna Metcalf
Notary Public

My commission expires May 3, 1986

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

| | | |
|--------------------------------|---|---------------------|
| ROBERT L. MENDENHALL |) | |
| |) | Civil No. |
| Plaintiff, |) | R-80-146-ECR |
| |) | |
| v. |) | AFFIDAVIT OF |
| |) | |
| THE UNITED STATES OF |) | ROBERT L. |
| AMERICA, THE UNITED |) | MENDENHALL |
| STATES DEPARTMENT OF |) | |
| INTERIOR, and CECIL D. |) | EXHIBIT 10 |
| ANDRUS, Secretary of |) | |
| the Interior and EDWARD |) | |
| SPANG, State Director |) | |
| of Nevada Bureau of |) | |
| Land Management, |) | |
| |) | |
| Defendant. |) | |
| |) | |

AFFIANT, being first duly sworn upon oath, avows and deposes as follows:

1. That I, Robert L. Mendenhall, the President of Las Vegas Paving Corporation and the Plaintiff herein, purchased the Charleston #24/39 association placer mining claim on March 7, 1979, which at that time contained excavations evidencing past production of from fifty thousand to one hundred thousand tons of naturally occurring high quality asphalt concrete

aggregate (N.O.H.Q.A.C.A.) and the Charleston 1 through 22 claims to the north contained evidence of production of at least three times that quantity for the previous forty years. (See Exhibit 8 attached hereto).

2. That I was born into the asphalt concrete aggregate business in that my father and his father before him specialized in the asphalt paving business in central Utah.

3. That in 1954 I moved to Las Vegas, Nevada, started the Las Vegas Paving Corporation, pioneered hot-mix asphalt recycling in America and have 28 patents for both equipment and processes for the Asphalt Concrete Aggregate Industry.

4. That during my thirty years working with Asphalt Concrete Aggregate, I have examined hundreds of aggregate sources in Utah, Nevada, California and Arizona and calculated the costs of processing the rock

occurring thereon into high quality Asphalt Concrete Aggregate.

5. That in early 1978 while searching for a source of High Quality Asphalt Concrete Aggregate in the Las Vegas area I flew the surrounding hills in search of such an aggregate source and first saw the Charleston claim area from the air, then visited the ground and found that this pitted area, within easy access of Las Vegas, contained a naturally occurring crushed and sorted aggregate that was uniquely suited for Asphalt Concrete Aggregate.

6. That I then went in search of the claim owners and found that Mr. Frank Sullivan owned the Charleston claims and I took an option to purchase the claims. Mr. Sullivan represented that he owned the claims and I went to the County recorder and searched the record for evidence that Sullivan owned the Charleston claims, and



found nothing that would indicate that the claims were not in good standing and then exercised my option and went to producing aggregate therefrom.

7. That as I produced the aggregate and used it in our hot asphalt mix designs - confirmed my belief that we had a superior quality aggregate which we could produce directly from the claims without crushing, washing, or any treatment other than screening out random oversized boulders and thus we had a Naturally Occurring High Quality Aggretate (N.O.H.Q.A.C.A.) which had the following qualities possessed by no other Asphalt Concrete Aggregate:

- a. The naturally occurring angular fragments lie an optimum distance from the source so that the corners are rounded just enough to fit snugly together to form a very dense finished product.

- b. The angular fragments are naturally sorted so that they fit all standard specifications for asphalt concrete aggregate.
- c. The angular fragments on Charleston 24/39 can be screened to produce surfacing "chips" (- 3/8th to + 3/16ths) for asphalt concrete pavements without crushing or other treatment of any kind.
- d. This naturally occurring high quality asphalt concrete aggregate requires low levels of asphalt (3.5% to 3.8%) where normal manufactured aggregates in the Las Vegas area require approx. 5% asphalt.
- e. The density of the resulting asphalt mix is higher than the normal asphalt aggregate by some 5 to 10 pounds per cubic foot.

FURTHER, Affiant sayeth not.

Robert L. Mendenhall

Robert L. Mendenhall

STATE OF NEVADA)
) ss.
County of Clark)

On this 9th day of Sept., 1982, before me personally appeared Robert L. Mendenhall, who acknowledged this document before me.

Rosemarie Heide Ward

Notary Public

My commission expires:
Sept. 17, 1983